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THE coming term of the United States Supreme Court, it is expected, will be an interesting one. Notice has already been given that an effort will be made to impeach the constitutionality of the New York electrocution law, on the ground that it is a "cruel and unusual punishment," and demonstrated as such by the Kemmler execution. A Japanese murderer, it is said, is the man in whose behalf this point will be raised. Another case which will attract attention, will be an effort made to secure the release of one of the Chicago anarchists, now in prison under sentence. It will be remembered that friends of the prisoner made strenuous claim of the invalidity of the sentence, upon the ground that he was not present in the appellate court, when judgment of affirmance was pronounced, a point which is not likely to meet with much consideration by the court. The liquor laws of the various States, however, will furnish the largest number of cases of general interest. The court will early be given an opportunity to re-affirm the doctrines laid down in the "original package" decision, and the question will arise in a number of cases from prohibition States as to the legality of the action of United States courts in connection with State prosecutions under the liquor laws.

IT is likely that there will be several changes in the personnel of the supreme court within the next two or three years. Justice Field is 74 years of age, while Justice Bradley, his junior in point of service, is three years his senior in age. Either could have retired on full salary for life. Two years hence the like right will be open to Justice Blatchford, who at that time will be ten years a member of the court, and 72 years of age. The probability therefore is, that the supreme court will contain more new faces within the next few years than it gained in any other equal period in the present decade. There seems to be something in service on that bench which is favorable to longevity. Few of its members have reached it until attaining middle life, yet the instances in which service has been extended to more than a quarter of a century are not rare. John Marshall, of Virginia, and Joseph Story, of Massachusetts, exceeded that limit nearly ten years, while the service of John McLean, of Ohio, and James M. Wayne, of Georgia, continued thirty-two years; that of Bushrod Washington, of Virginia, thirty-one years; of William Johnson, of South Carolina, thirty years; of Roger B. Taney, of Maryland, and of John Catron, of Tennessee, twenty-eight years; and of Samuel Nelson, of New York, twenty-seven years. Marshall heads the list in this respect, his service extending over thirty-four years.

JUDGE JACKSON, of the United States Circuit Court for Ohio, has recently made an important ruling under the interstate commerce act which, though it has excited some criticism, and has led many of the daily newspapers to charge that it takes out of the interstate commerce act about the only thoroughly commendable thing in it, we think to be eminently reasonable and just. It was held by him that the issuance of "party-rate tickets," each for a party of ten persons, at the rate of two cents per mile per capita, while single passengers are charged three cents per mile, is neither an unjust discrimination nor an undue or unreasonable preference or advantage, within the purview of the interstate commerce act, where such "party-rate tickets" are offered to the public generally, and where it appears that the rate charged single passengers is not unreasonable; and that where a railroad company is charged with violating the interstate commerce act, by the issuance of "party-rate tickets" at less than the rates charged single passengers, the burden of proving that such lower charge constitutes an undue preference is upon the person making the charge. He held further that the interstate commerce act having adopted substantially most of the provisions of the English railway traffic acts of 1845 and 1854, the construction given to such provision by the English courts must be received as incorporated into the act, thus following McDonald v. Hovey, 110 U. S. 619.

NOTES OF RECENT DECISIONS.

SPECIFIC PERFORMANCE—PAROL CONTRACT—PART PERFORMANCE—STATUTE OF FRAUDS.—It is not often that an appellate court has the temerity to admit the error of previous rulings, and therefore the action of the Supreme Court of Missouri in Emmel v. Hayes, 14 S W. Rep. 209 should be noted. It was there held that in order to prove a parol contract to convey land, acts of part performance must first be proved which unmistakably point to a contract between the parties, or which cannot be reasonably accounted for in any other manner than as having been done in pursuance of such a contract; and where land has been sold on execution, and a sheriff 's deed taken, the mere retention of the land by the execution debtor is not such an act of part performance as will take out of the statute of frauds a contract of the grantee in the sheriff's deed to convey to the execution debtor. The court admits the error of its rulings in Simmons v. Headlee, 94 Mo. 482, and Emmel v. Headlee, 7 S. W. Rep. 22. Sherwood, J., after discussing the authorities upon the general proposition, says:

Having made these extensive quotations from the authorities the purpose of making which will be made manifest a little further on, we will now turn our attention to some of the cases cited by defendants as supporting their contention in this cause, a contention at variance with the views heretofore expressed as to the necessity of showing something more than a mere retention of possession. The case of Brown v. Jones, 46 Barb. 400, was one where a purchaser of land by parol agreement was in possession at the time, though the land was wild and uncultivated, who thereupon made permanent improvements by cleaning and cultivating the same, which cleaning and cultivation added 50 per cent. to the value of the land, and he also paid all taxes and assessments, etc., and it was held he was entitled to specific performance on paying the purchase money. In Pain v. Coombs, 1 De Gex & J. 34, a parol agreement was entered into for a lease of a farm. A solicitor was seen by both parties, and he was directed to prepare a rough draft for a lease, which he did, and forwarded it to the lessor, who without objecting to it, let the tenant into possession, and directed the solicitor to prepare a lease in conformity to the draft; and upon this it was ruled that the delivery and taking of possession was a sufficient part performance of the agreement, as expressed in the draft, to exclude a defense founded on the statute of frauds, and by consequence to authorize specific performance. The case of Gregory v. Mighell, 18 Ves. 328, was one where a parol agreement for a lease was made, and the allegation of the answer resisting performance, that possession was taken without the defendant's consent, was thought by Sir William Grant, M. R., to be disproved by two witnesses, as well as by the very significant and pregnant fact that the defendant allowed the plaintiff to maintain the possession as tenant, making expenditures for eight years before he brought ejectment; and therefore that eminent master of the rolls held that the defendant was not at liberty to say that it was a possession without consent, and that plaintiff was a trespasser, and so specific performance was decreed. In Fisher v. Moolick 13 Wis. 321, Moolick was a pre-emptor of a piece of public land, and while in possession of it applied to Fisher for a loan of money to enable him to enter the land within the year. The arrangement was effected whereby Fisher entered the land, took the receiver's receipt in his own name, with the parol agreement to convey the land to defendant upon the payment of $50 in one year, with 25 per cent. interest. Fisher was willing, after the entry, to confirm the matter by a written contract to that effect, and sent word of that purport to Moolick to come and get such a contract, but died before executing it. Meanwhile, after the entry, Moolick went on under the faith of the parol contract, and with the consent of Fisher made valuable improvements on the land, and upon the death of Fisher paid up the principal and interest to the administrator, taking written receipt containing a memorandum of the description of the land, and the administrator thereupon took the money thus obtained and paid it over as directed by the probate court: and upon this showing the ejectment of the heirs of Fisher against Moolick was defeated, and a decree entered in behalf of the latter. Miller v. Ball, 64 N. Y. 286, was one similar in its general circumstances to the one cited from Wisconsin. (*Infra.*) In all of these cases cited it will be observed that there was a radical and marked change in the circumstances of the party claiming specific performance—a change which plainly indicated that some kind of a contract had been made between them. But here, in the case at bar, what have we to indicate any change in the attitude of the parties towards each other? What acts were done? None whatever. The only thing pretended to be done was the bare retention of the possession of the property which was in no proper sense an act at all. The case of Snider v. Thrall, 56 Wis. 674, 14 N. W. Rep. 814, was a case of sale of a house as personal property on which a chattel mortgage had been given. There was no question of specific performance in the case, nor could there have been. The head-notes disclose the whole case, as follows: "Property in the possession of a bailee may be sold to him and a good delivery made without being actually taken into the possession of the owner, and then returned to the possession of the vendee. So where a house (treated as personal property) was in the possession of the vendee at the time of the sale thereof, and he continued in possession after and under the sale, it is held that there was such a delivery as would take the contract out of the statute of frauds, although no part of the purchase money was paid, and no note or memorandum of the contract was made in writing." That case was much relied on in the opinion of this court in Simmons v. Headlee, 94 Mo. 482, 7 S. W. Rep. 20, where it was held that the bare retention of the possession by the former owner was sufficient to take the case out of the statute of frauds, and it was there said in support of this view that to require O'Callahan "to surrender the possession he had, and then take possession under the contract, is extremely technical." That this view is wholly unsupported by authority, has been already shown by the extensive quotations and extracts already made for that purpose. And it may be remarked that the necessity for surrendering the possession under the circumstances supposed, and the taking of the possession under the contract, is no more "technical" then that required of a tenant when he would dispute the

title of his landlord; for he, in order to do this, must first surrender the possession of the premises in good faith to his landlord, and then he can resume the possession and dispute his landlord's title successfully. 2 Wood, Lundl. & Ten. (2d Ed), §§ 498-500, and notes; Littleton v. Clayton, 77 Ala. 571. These considerations constrain us to say that we erred in our rulings in Simmons v. Headlee, *supra*, as well as in the similar case Emmel v. Headlee, 7 S. W. Rep. 22. Consequently we will no longer adhere to those rulings.

MUNICIPAL CORPORATION—POWER TO BORROW—ULTRA VIRES—IMPLIED CONTRACT.—The express and implied powers of a municipal corporation in the borrowing of money and in the loaning of its credit was ably considered by the Supreme Court of Alabama in Allen v. Intendant and Councilmen of La Fayette, 8 South. Rep. 30. It was there held that where municipal officers are authorized to purchase and hold for the benefit of the town, property to a certain value and are also authorized to maintain public schools and to this end as well as to defray the ordinary expenses of municipal government are authorized to levy taxes, they may buy a school house (its value together with the property already owned not exceeding the value of property authorized to be held) on credit and give warrants therefor. Where however the municipal officers have no express authority to borrow money and instead of warrants being given to the vendor of the school house, they borrow money and give warrants therefor and with the money pay the vendor, the warrants are void but the town is liable on an implied contract to repay the money which it has received and applied to an authorized purpose. McClellan, J., says:

The intendant and councilmen of La Fayette had no authority, therefore, to borrow this money, nor had they any authority to draw the warrants which were drawn and delivered to Mrs. Frederick. They were the trustees for the inhabitants of the town. Their action in excess of the power with which the trust relation clothed them, and in violation of the duties they owed to their *cestuis que trustent*, the present complainants, among others, was of no manner of efficacy in fixing a liability on those for whom they thus usurped the power of acting. The warrants in the hands of Mrs. Frederick are as if they were not, and had never been. Neither the municipality of La Fayette, nor any of its officers or agents, is under any obligation, legal, equitable or moral, to pay those warrants, or to fulfill the contract out of which they sprung. But back of that contract, and back of those warrants, there is, on the facts presented by the bill and accentuated by the answers, not only a moral but a legal liability resting on the municipality of La Fayette, and its own officers, to repay the money which came from Mrs. Frederick, and has been used by the corporation for authorized corporate purposes In other words, the town of La Fayette is liable as upon an implied *assumpsit*, not under, but wholly apart from, the unauthorized contract, and not for the amount its officers borrowed from Mrs. Frederick, but for the amount of her money which they received and applied to the purchase of a house which the charter authorized them to buy and the town to hold, which was reasonably necessary to the exercise and performance of expressly granted and imposed functions and duties, and which the use of her funds had enabled the corporation to acquire and devote to its legitimate purposes.

The authorities are not uniform to this proposition. It is however believed to be eminently sound in principle, and has the support of some of the most distinguished law-writers, and of courts of marked ability and learning. It is thus formulated by Mr. Brice with general reference to both public and private corporations: "Persons who have in any way advanced money to a corporation, which money has been devoted to the necessaries of the corporation, are considered in chancery [and, also, it would seem to follow, in the equitable action for money had and received at law] as creditors of the corporation to the extent the loan has been expended," and, in support of the doctrine thus stated, he cites many cases in which corporations without any authority, expressed or implied, to that end had borrowed money, and been holden, although the contract itself was wholly void, to account for so much of it as had been expended in furthering the legitimate objects of the concern. Green's Brice, Ultra Vires, 724 *et seq.* And in this connection the American editor of the work cited observes: "In the United States the defense of *ultra vires*, interposed against a contract wholly or in part executed, has very generally been looked upon with disfavor. The result has been that in some cases a liberal construction has been applied so as to destroy the foundation of the defense; in others, the courts have allowed the recovery of the money paid, not upon the contract, but because of the money received and the benefits enjoyed; while in still another class of cases the doctrine of estoppel *in pais* has been applied to exclude the defense." And many American cases are cited which support one or other of the positions stated as being taken by the courts of this country in respect to private corporations. In regard to municipal corporations, the opinion of Judge Dillon manifestly is in line with the position we have taken. We believe this to be a correct formulation of his view of the law on the point under consideration, as gathered from his inestimable work on municipal corporations that municipal corporations are liable to action of implied *assumpsit* with respect to money or property received by them and applied beneficially to their authorized objects through contracts which are simply unauthorized, as distinguished from contracts which are prohibited by their charters, or some other law bearing upon them, or are *malum in se*, or violative of public policy. 1 Dill. Mun. Corp. §§ 126, 132, 133, 459, 465; 2 Dill. Mun Corp. §§ 936, 938. Thus in a note to section 126 it is said: "If money is improperly borrowed in advance of liabilities actually created, and reaches the municipal treasury, and is expended by direction of the governing body for authorized municipal objects, the municipality may then * * * be liable in a proper action or suit; but the action should be, we think, for money had and received, or by suit in equity, and not upon the invalid bonds." And under section 935 it is said that, "where the corporation receives and retains

the consideration of an *ultra vires* contract, it may be liable upon an implied *assumpsit* in respect to such consideration." And the opinion of Chief Justice Field in a case where the subject underwent very thorough examination is quoted approvingly to the effect that "the doctrine of implied municipal liability applies to cases where money or property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake or without authority of law, it is her duty to refund it, not from any contract entered into by her on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it, or if used by her, to render an equivalent to the true owner from the like general obligation; the law, which always intends justice, implies a promise." Argenti v. San Francisco, 16 Cal. 255. Justice Miller, speaking of cases where corporations have been sued on contracts which they have successfully resisted because they were *ultra vires*, observes; "But even in this class of cases, the courts have gone a long way to enable parties who have parted with property or money on the faith of such contracts to obtain justice by recovery of the property or the money, specifically, or as money had and received to plaintiff's use.". Salt Lake City v. Hollister, 118 U. S. 156, 6 Sup. Ct. Rep. 1055. To a like effect are the following cases; Pimental v. San Francisco, 21 Cal. 362; Clark v. Saline Co., 9 Neb. 516, 4 N. W. Rep. 246; Marsh v. Fulton Co., 10 Wall. 676; Louisiana v. Wood, 102 U. S. 294; Chapman v. County of Douglas, 107 U. S. 348, 2 Sup. Ct. Rep. 62. The case of Read v. Plattsmouth, 107 U. S. 568, 2 Sup. Ct. Rep. 208, involved the constitutionality of a statute of Nebraska which undertook to impart legality and vitality to certain previously issued bonds of the city of Plattsmouth, upon which money had been raised by the city, and applied to the acquisition of a lot, and the building thereon of a school-house, but which were void for lack of charter power to issue them. The question of the constitutionality of the statute turned upon a consideration of whether, granting the utter invalidity of the bonds as such, the city was nevertheless not bound for the money thus received and used for corporate purposes; and to this point Justice Matthews delivered the opinion of the Supreme Court of the United States as follows; "In the present case, the statute does not impose upon the city of Plattsmouth, by an arbitrary act, a burden without consent and consideration. On the contrary, upon the supposition that the bonds issued, as to the excess of $15,000, were void because unauthorized, the city of Plattsmouth received the money of plaintiff in error, and applied it to the purpose intended, of building a school house on property, the title to which is confirmed to it by the very statute now claimed to be unconstitutional, and an obligation to restore the value thus received, kept and used, immediately arose. This obligation, according to general principles of law accepted in Nebraska, was capable of judicial enforcement." The case of Gause v. City of Clarksville involved the power of a municipality, invested with the ordinary corporate powers, to borrow money. The power was denied, and the bonds on which the money was borrowed were held to be void. After announcing this conclusion, Dillon, circuit judge, proceeds: "It will not validate these bonds so as to make them the basis of a recovery even if it be shown that the money borrowed was in each instance used for the purpose for which they are recited in the deed to have been borrowed. But the plaintiff may amend and add in respect to these bonds counts in the nature of counts for money had and received. Adhering to the decisions of this court —Treat, J., in Louisiana v. Wood [affirmed on appeal, and reported in 102 U. S. 294],—the present holder of the bonds will then be treated as the assignee of the original holder or payee, in respect of the money actually lent to the city; and, if after the city obtained it, the same was in fact expended for the erection and repair of wharves, or the improvement of the streets, or possibly if expended for other authorized municipal purposes under the authority of the city council, the amount advanced with lawful interest, less payments thereon, may be recovered." Gause v. Clarksville, 5 Dill. 180.

We find no adjudication in Alabama irreconcilable with the doctrine of the foregoing authorities. There are indeed cases which hold that recovery cannot be had upon the *ultra vires* contract of borrowing.

So much for the adjudications of this court. We repeat that nothing decided in them is opposed to the view we have taken. There are some cases in other States which assert the contrary doctrine. One of them is Hackettstown v. Swackhamer, 37 N. J. Law, 191, decided by the Supreme Court of New Jersey, which ranks among the ablest in the country. The opinion denies a right of recovery for money had and received and appropriated to corporate purposes, when it has been obtained on an *ultra vires* borrowing contract; Beasley, C. J., intimating that the only remedy, if any, was in equity, to be subrogated to the claims of creditors whose debts had been paid with the borrowed money. Judge Dillon says of this proposition: "No necessity is perceived for so strict a doctrine." 1 Dill. Mun. Corp. § 126, note. No other cases are cited by counsel to this point than those we have referred to. Two or three others, tending in greater or less degree to support the view taken by the New Jersey court, have come under our observation in the somewhat exhaustive examination we have given this question, but our conclusion is that the weight of authority is in favor of the implied liability of municipal corporations, under the facts disclosed in this record.

We cannot perceive that the doctrine is open to objection on the ground of its supposed evil tendencies and consequences. It is shorn of all perilous possibilities by the limitation which hedge it about. It cannot obtain where the charter, or other statute operating in the premises, contains a prohibition of the power to borrow money, since a promise cannot be implied in the face of express law, but only in cases where, as in this one, there is merely a defect of power. *Id.* § 461. It involves no danger of the municipality being charged with moneys which have been appropriated by its officers to its own use, or even to the use of the corporation, except in the manner, to the extent, and for the purposes authorized by the charter, as in either case the implication will not arise, and corporate liability will not attach. None of the evils which are justly supposed to result from the power to borrow money, which are not also attendant upon the capacity to incur debts, and which therefore have led to a denial of the former power unless expressly or by necessary intendment conferred, while the latter is admitted as incident to ordinary municipal functions, can possibly supervene where the money which has been borrowed has also been

honestly devoted to expenditures for which the corporate authorities might have incurred debt. And, to declare liability in the one instance, and deny it in the other, on the ground of evils which pertain alike to both, would be an anomaly to which we cannot subscribe. Indeed, we apprehend that the power to create debts may be productive of more evils in municipal government than could, in the nature of things, result from the doctrine we are considering, when would-be lenders of money come to understand that the return of their proverbially timid capital depends not upon the contracts they make, but on the faithful application of the loan to certain specific objects, by persons over whom they have no control. From every point of view, therefore, we feel safe in affirming that, under the case presented by the bill and answer—there really being no dispute about the facts in this regard—Mrs. Frederick has a valid demand against the town of La Fayette for the amount of money advanced by her, not because the corporate authorities agreed to repay it to her, but because they have legitimately used it for the benefit of the town, in a way and to an end fully authorized by its charter. The warrants she holds are not enforceable as such, yet they truly represent the amount of her claim, and in the payment of that amount the corporate authorities would do no more than equity and justice require of them.

CERTIFIED CHECKS.

The custom or practice of certifying checks is one of the most important developments of the modern banking and commercial system. This system has become general throughout the United States, and its extent may be judged from a computation made several years ago, showing that the average daily amount of certified checks in use in the city of New York alone is more than one hundred millions of dollars.[1]

But notwithstanding the extent and importance of this custom, the law upon the subject is not generally understood, nor, indeed, is it well settled as to all phases of the subject. An article in which the general rules are stated, and the authorities upon the more difficult questions arising out of the custom are considered, ought not, therefore, to be untimely.

The usual mode of certifying a check is for the cashier or proper officer of the bank to write or stamp upon the check the word "good," "certified," or "accepted," to which his name or initials ought to be added,[2] although one of those words alone, without the name or initials of the officer, may be sufficient.[3] And it has been held that a verbal certification or acceptance is sufficient,[4] unless required by statute to be in writing.[5] An interesting case, in which the sufficiency of an acceptance by telegram was involved, was recently decided by the United States Circuit Court for the Western District of Missouri. The Missouri statute requires that an acceptance must be in writing, but that it may be upon a separate paper, and will then bind the acceptor in favor of one to whom it is shown, and who takes the instrument on the faith thereof for a valuable consideration. The bank accepted the check by a telegram which was shown to the plaintiff, who, relying thereon, took the check for a valuable consideration. The court held that the bank was liable.[6] So, if the drawee promises the drawer to pay the check, and this promise is communicated to the holder who takes the check on the faith thereof, such promise is binding on the drawee where the latter has funds of the drawer sufficient to make the payment.[7] It has also been held that if the drawee settles with the drawer, retaining just enough to pay the check, a promise may be implied upon which an action will lie.[8] But where a check is drawn upon a bank by a drawer who has no funds on deposit, it has been held that the bank is not liable upon its verbal promise to pay, because such a promise cannot be enforced under the statute of frauds.[9] If a bank certifies a check by mistake, it may

[1] This statement was made by no less an authority than Mr. Justice Swayne, in Merchants' Bank v. State Bank, 10 Wall. 604, 647.

[2] 2 Morse on Banking, §§ 405, 406; Tiedeman on Commercial Paper, § 437.

[3] See Barrett v. Smith, 30 N. H. 256.

[4] Barrett v. Smith, 30 N. H. 256; Irving Bank v. Wetherald, 36 N. Y. 335. See, also, Pierce v. Kittredge, 115 Mass. 374; Fisher v. Beckwith, 46 Am. Dec. 174 and note; Scudder v. Union Nat. Bank, 91 U. S. 406; 2 Morse on Banks, § 406*a*.

[5] See Risley v. Phœnix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Lynch v. First Nat. Bank, 107 N. Y. 179, 1 Am. St. Rep. 803.

[6] Garretson v. North Atchison Bank, 29 Cent. L. J. 306. Compare Kahn v. Walton, 20 N. E. Rep. 203. See also Bank v. Howard, 40 N. Y. Super. Ct. 20. The general subject of the presentation and acceptance of checks is treated in an excellent leading article in 26 Cent. L. J. 339.

[7] Nelson v. First Nat. Bank, 48 Ill. 36. Otherwise if the holder has not taken the check on the faith of such promise. Carr v. Nat. Security Bank, 107 Mass. 45; First Nat. Bank v. Pettit, 41 Ill. 492.

[8] Saylor v. Bushong, 100 Pa. St. 23, 45 Am. Rep. 353. See also Seventh Nat. Bank v. Cook, 73 Pa. St. 483, 13 Am. Rep. 751.

[9] Morse v. Mass. Nat. Bank, 1 Holmes (C. C.), 209. See 2 Morse on Banks and Banking, § 406.

withdraw the acceptance at any time before the rights of third parties have intervened.[10]

The by-laws of a bank may give to any officer the authority to certify checks,[11] but certain officers have this power *virtute officii*. The board of directors may exercise this authority;[12] so may the president,[13] the teller,[14] or the cashier;[15] but it is generally held that the assistant cashier has no such power.[16] Nor can any officer bind the bank by certifying his own check,[17] or by certifying a post-dated check before its date.[18] And it may be stated as a general rule that no officer is authorized to certify a check which contains unusual clauses and conditions destroying its commercial character, or which is not presented or received in the usual course of business.[19]

In an important case which recently came before the New York Court of Appeals for the third time, a bank was held liable for the negligence of its teller in stating that a certification was good, when an examination of the books of the bank would have informed him that the check had been lost, and that the bank had been ordered not to pay it. The court of appeals also held that the court below properly refused to charge that the teller was not the agent of the bank for the purpose of giving information other than as to the genuineness of the signature of the drawer.[20]

The certification of a check by a bank is equivalent to an acceptance, so far, at least, as the liability of the drawee is concerned.[21] It imports that the check is drawn upon sufficient funds, and binds the bank to retain a sufficient amount thereof to meet and pay the check when it is presented.[22] In some cases and by some of the text writers, the rule is stated broadly, that by certifying a check the bank becomes the principal debtor, and the drawer is discharged.[23] Where the holder himself presents the check to the bank, and instead of getting it cashed procures its certification, it is no more than just that, so far as the drawer is concerned, the check so certified should operate as a payment, and he should be released. But where the drawer has the check certified before delivering it to the holder, and the bank fails before the holder can get the check cashed, it seems to the writer that the check does not operate as a payment, and that the drawer ought not to be released. It has been expressly so held by the Supreme Court of Indiana, in a recent case, in which it is said: "There is no just reason for concluding that a party who takes a certified check in the ordinary course of business, assumes the risk of the solvency of the bank chosen by the drawer as his place of deposit. The fair and reasonable implication is, that the party who selects for himself the bank which he will trust with his money, assumes the risk of its solvency."[24] Other courts have made the same distinction and applied the same rule.[25] Where the holder himself procures the certification instead of requiring payment from the bank, the rule is otherwise.[26]

[10] Second Nat. Bank v. West. Nat. Bank, 51 Md. 128, 34 Am. Rep. 300; Irving Bank v. Wetherald, 36 N. Y. 335. See also National Bank v. Second Nat. Bank, 69 Ind. 479.

[11] Tiedeman on Commercial Paper, § 438.

[12] Tiedeman on Commercial Paper, § 438.

[13] Claflin v. Farmers' Bank, 25 N. Y. 293; Merchants' Bank v. State Bank, 10 Wall. 648; "Powers of Bank Presidents," 21 Cent. L. J. 144, 145.

[14] Farmers' Bank v. Butchers' Bank, 14 N. Y. 624; Hill v. National Trust Co., 108 Pa. St. 1, 56 Am. Rep. 189; Mead v. Merchants' Bank, 25 N. Y. 146. *Contra*, Mussey v. Eagle Bank, 9 Met. 313.

[15] Merchants' Bank v. State Bank, 10 Wall. 648; Pope v. Bank, 59 Barb. 226; Cook v. State Nat. Bank, 25 N. Y. 96. *Contra*, Mussey v. Eagle Bank, 9 Met. 313. See "Powers of Bank Cashiers," 20 Cent. L. J. 126, 127.

[16] Pope v. Bank, 57 N. Y. 127; 2 Morse on Banks and Banking, § 413. See Hill v. Nat. Trust Co., 108 Pa. St. 1.

[17] Claflin v. Farmers', etc. Bank, 25 N. Y. 294, 20 Am. L. Reg. (N. S.) 92. See also Titus v. G. W. Turnp. Co., 5 Lans. 253.

[18] Clarke Nat. Bank v. Bank of Albion, 52 Barb. 593.

[19] Dorsey v. Abrams, 85 Pa. St. 299; Tiedeman on Commercial Paper, § 439.

[20] Clews v. Bank, 114 N. Y. 70.

[21] Merchants' Bank v. State Bank, 10 Wall. 604, 648; Barnes v. Ontario Bank, 19 N. Y. 159; Meads v. Merchants' Bank, 25 N. Y. 146, s. c., 82 Am. Dec. 331; Helwege v. Hibernia Nat. Bank, 28 La. Ann. 520; Tiedeman on Commercial Paper, § 436.

[22] Farmers, etc. Bank v. Butchers', etc. Bank, 16 N. Y., 125, 69 Am. Dec. 678; Freund v. Importers' Bank, 76 N. Y. 352; 2 Morse on Banks and Banking, § 414.

[23] See First Nat. Bank v. Whitman, 94 U. S. 343, 3 Am. & Eng. Ency. of Law, 220; Tiedeman on Commercial Paper, § 436; Nat. Commercial Bank v. Miller, 77 Ala. 168.

[24] Borne v. First Nat. Bank, 24 N. E. Rep. 173, 31 Cent. L. J. 23.

[25] Bickford v. Bank, 42 Ill. 238; Bank v. Rotge, 28 La. Ann. 933; Andrews v. Bank, 9 Heisk. 217; Larsen v. Breene, 21 Pac. Rep. 498. See also Levi v. Nat. Bank of Mo., 7 Cent. L. J. 249; Tiedeman on Commercial Paper, § 456.

[26] 2 Morse on Bank and Banking (3d ed.), § 414*d*; Bank v. Leach, 52 N. Y. 350; Thomson v. Bank, 81 N.

In a recent communication to the CENTRAL LAW JOURNAL, the doctrine of the case cited from Indiana is denied, and it is said that it can make no difference whether the certification is procured by the drawer before delivery or by the holder after delivery, for the drawer is released in either case, upon the ground that "the moment the check is certified the funds cease to be under the control of the original depositor or drawer, and pass under the control of the drawee."[27] The lower court, in the case thus criticised, reached the same conclusion as that of the court on appeal, and the decision is expressly approved in the last edition of Morse on Banks and Banking.[28]

Mr. Bryant draws the same distinction, and says that it is well setted, both in reason and upon authority, that the drawer is not released where he has the check certified before delivery, although he would be if the holder procured the certification himself after delivery.[29] And in several of the cases in which the drawer has been held to have been released by the holder getting the check certified after delivery, the courts have been careful to state that a different rule would have been enforced if the drawer had procured the certification. Thus, in one case it is said: "This would not discharge the drawer of a check who himself procured it to be certified, and then put it into circulation. The reason of the rule fails to apply to him in such case."[30]

Even if the effect of a certification obtained by the drawer before delivery is to withdraw the fund from his control and to place it under the control of the drawer, it is difficult to perceive any good reason why that of itself should release the drawer. But the authorities speak for themselves, and the reasons given in the cases cited as supporting the distinction herein made seem conclusive.

It has also been held that an assurance by the drawee bank that a check is good and will be paid, is not such a certification of the check as will release the payee, where the holder cashes the check on the payee's indorsement, and presents it for payment in the due course of business.[31]

So it is held in Illinois that where a check has been certified before its delivery to the payee or holder, the certification merely has the effect of increasing its currency by adding the liability of the bank to that of the drawer.[32]

Where the certificate does not state the time of payment, the check is generally payable on demand;[33] but it may provide for payment at a certain time in the future, and where such is the case payment cannot be insisted upon in advance of the time specified.[34] The obligation of a bank to pay a certified check to one presenting it, after the maker's funds in the bank have been attached, depends upon the *bona fides* of the holder. If the bank has notice that this is lacking, it pays the check at its peril.[35] Where the bank on which a check is drawn, and by which it is certified, fails and makes an assignment, the holder waives none of his rights against the drawer by giving notice to the assignee not to pay over any money to the drawer.[36]

By certifying a check the bank guarantees or agrees that the signature of the maker is genuine, but does not guarantee that the check has not been "raised," or that no alteration has been made in the instrument.[37] If, therefore, the bank has paid a "raised" check in good faith, without negligence, no matter whether the alteration was made before or after the certification, it may recover the amount so paid, unless the holder has suffered in consequence of the mistake.[38]

Where a certified check is obtained by fraud from a bank, and is cashed in good faith by a firm, and the payee by mistake both

Y. 1; Girard Bank v. Twp., 39 Pa. St. 92; Nat. Com. Bank v. Miller, 77 Ala. 168; Simpson v. Pacific etc. Co., 44 Cal. 139.

[27] 31 Cent. L. J. 93.

[28] 1 Morse on Banks and Banking, § 415 and note 3.

[29] 27 Am. Law Reg. (N. S.) 141, 153.

[30] First Nat. Bank v. Leach, 52 N. Y. 350, 353. See also Thomson v. Bank of British America, 45 N. Y. Superior Ct. 1, 82 N. Y. 1; Essex Co. Bank v. Bank, 7 Biss. 193.

[31] Farmers', etc. Bank v. Bank (Tenn.), 12 S. W. Rep. 545.

[32] Rounds v. Smith, 42 Ill. 245; Brown v. Leckie, 43 Ill. 497.

[33] Tiedeman on Commercial Paper, § 439.

[34] Bank of England v. Anderson, 4 Scott, 50.

[35] 2 Lawson's Rights, Rems. & Pr., § 533, citing Gibson v. Park Bank, 49 N. Y. Super. Ct. 429. See also Bills v. Park Bank, 89 N. Y. 343.

[36] Bickford v. Bank, 42 Ill. 238, 89 Am. Dec. 436.

[37] Security Bank v. Nat. Bank, 67 N. Y. 458; White v. Continental Bank, 64 N. Y. 317; Second Nat. Bank v. West Nat. Bank, 51 Md. 128. See Espy v. Bank, 18 Wall. 621; Bank v. Baxter, 31 Vt. 101.

[38] Nat. Bank of Commerce v. Nat. etc. Bank, 55 N. Y. 211; Clews v. Bank, 89 N. Y. 418; Marine Nat. Bank v. Nat. City Bank, 59 N. Y. 67.

on his part and that of the firm, failed to indorse it, the firm holds it subject to all defenses that could have been made as between the original parties, and the bank is not estopped to deny liability upon the check by the fact that it was certified.[39]

A different conclusion, however, was reached in a somewhat similar case, where the indorsement of of the payee's name appeared on the check, although it was forged.[40]

In an action by a bank to recover the amount paid by it upon a "raised" check which it had certified, evidence that by the custom and common understanding of banks and merchants the word "certified," when used in certification of checks, imports an obligation on the part of the bank to pay the amount stated in the check, notwithstanding it was raised, has been held inadmissible.[41] This is true, for the reason that the law itself determines the effect of the certification.

Presenting a check and having it certified is not the same, either in fact or in law, as demanding payment; and the statute of limitation does not begin to run against a check marked "good" either from the date of deposit or the date of certification, but from the time payment is actually demanded and refused.[42]

W. F. ELLIOTT.

Indianapolis.

[39] Goshen Nat. Bank v. Bingham (N. Y.), 23 N. E. Rep. 180.

[40] Lane v. Nuffer, 5 N. Y. S. 421.

[41] Security Bank v. Nat. Bank, 67 N. Y. 458, 23 Am. Rep. 129; Second Nat. Bank v. Western Nat. Bank, 51 Md. 128, 34 Am. Rep. 300.

[42] Girard Bank v. Bank of Penn. Twp., 39 Pa. St. 92, 80 Am. Dec. 507. See also Bank of British N. America v. Merchants' Nat. Bank, 91 N. Y. 106; In matter of Franklin Bank, 19 Am. Dec. 420 and note; Merchants' Bank v. State Bank, 10 Wall. 607. Compare Brust v. Barrett, 82 N. Y. 400.

DAMAGES—PHYSICAL EXAMINATION OF PLAINTIFF.

ALABAMA G. S. R. R. V. HILL.

Supreme Court of Alabama, June 19, 1890.

When a plaintiff is seeking to recovery for physical injuries a motion by the defendant for a surgical examination of the plaintiff by experts is addressed to the sound discretion of the court, and the examination should be ordered, and had under the direction and control of the court, whenever it fairly appears that the ends of justice require the disclosure or of more certain ascertainment of facts, which can only be brought to light or fully elucidated by such an examination, and that the examination may be made without danger to plaintiff's life or health, and without the infliction of serious pain. A refusal of the motion when the circumstances present a reasonably clear case for the examination, will cause a reversal of the judgment in plaintiff's favor.

MCCLELLAN, J.: This is an action for personal injuries alleged to have been sustained by the plaintiff, who is appellee here, in consequence of defendant's negligence, whereby a car on which plaintiff was being carried as a passenger was derailed and overturned. The injuries chiefly complained of and relied on for the recovery which was sought and had in the court below are alleged to be internal and permanent in their nature, and very grievous, painful, and dangerous. Neither the fact of their infliction nor their extent, character, or probable consequences were determinable except by expert examination of the plaintiff's person in a manner most objectionable to a young woman of delicacy and refinement, as she is shown to be. Such examination had been several times made by her attending physician, who stood ready to testify, and did testify, in her behalf as to the results of his investigation. Prior to the trial on the day the trial was entered upon, and again pending the trial, after the plaintiff and her physician and other physicians had testified, the defendant moved the court for an order requiring plaintiff to submit to an examination by a reputable and disinterested physician or physicians to be appointed by and to conduct the investigation under the direction and control of the court at the cost of the defendant. When this motion was last made, plaintiff's attending physician, Dr. Drennen, had testified fully as to her injuries, and Drs. Chew, Wyman, and Whelan, who heard his testimony, had been examined in respect to the injuries described by him, and had to a greater or less extent drawn his diagnosis in question. In support of the motion, the affidavits of three reputable and experienced physicians were put in evidence to the effect that the proposed examination would not be painful or at all hazardous; that the injuries described in the complaint, which were the same deposed to by Dr. Drennen, were not of a character to produce such nervousness as would render the examination dangerous to the life or health of the plaintiff; and that if she was able to attend the trial of her case, which she did, the plaintiff could without risk sustain the ordeal of the proposed investigation. On the other hand, two affidavits were offered against the motion—one by Drennen, that the plaintiff was a delicate and refined female about nineteen years old, of nervous temperament, and had been rendered exceedingly nervous, even hysterical, by the shock of the accident, and the consequent ills which had since afflicted her; and that the proposed examination would involve danger to her health, though it appears from this affidavit that he himself had made "several thorough surgical exami-

nations of the plaintiff" of the kind proposed, without any ill results therefrom. The other opposing affidavit was by one of plaintiff's counsel. He deposes to her age, delicacy of feeling, nervous temperament, low state of health, etc.; to the high standing of Drennen as a physician and surgeon, and to the facts that Drennen had made the physicial examinations proposed by the motion, and would testify in regard thereto on the trial. On this state of facts, the court severally and successively overruled the motion each time it was presented, and refused to require the plaintiff to submit to a physicial examination. The propriety of this action of the court is one of the leading questions presented by this appeal.

The authorities are somewhat conflicting on the point thus presented. A pioneer case, declaratory of the power of courts to require the plaintiffs, in actions of this character, to submit themselves to physical examination by experts, a case, too, which is put forward by the appellant as a leading one in support of the right which the lower court denied to it is that Walsh v. Sayre, 52 How. Pr. 334, decided by the special term of the superior court of New York. This case was approved by the special term of common pleas of New York in Shaw v. Van Rensselaer, 60 How. Pr. 143, in an *obiter dictum*, though an application for an inspection of the person was denied on the facts there presented. Subsequently the question came under review in the supreme court of the State, and Sayre's Case was, in effect, overruled, and the power of the courts to order an inspection of a plaintiff's person was repudiated and denied. Roberts v. Railroad Co., 29 Hun, 154. So that the law may be considered settled in the State of New York against the exercise of this power by the courts. In Missouri, the course and history of judicial opinion on the subject has been precisely the reverse of that exhibited in New York. The Supreme Court of Missouri first held that "the proposal to the court to call in two surgeons and have the plaintiff examined during the progress of the trial as to the extent of her injuries is unknown to our practice and to the law, * * * and the court had no power to enforce such an order. Loyd v. Railroad Co., 53 Mo. 509. Afterwards, this decision was seceded from, and the doctrine thoroughly established in that State that the trial court has the power to require the plaintiff to submit to surgical examination as to the character of the injuries complained of, but that defendant has no absolute right to demand an order for such investigation and such examination is a matter of discretion with the court, the exercise of which will not be interfered with unless manifestly abused. Shepard v. Railway Co., 85 Mo. 629; Sidekum v. Railway Co., 93 Mo. 400, 4 S. W. Rep. 701; Owens v. Railroad Co., 95 Mo. 169, 8 S. W. Rep. 350. The power of courts to this end is denied in Illinois in a very meager, unreasoned, and unsupported opinion of the supreme court, in which the subject is dismissed with the assertion that "the court had no power to make or enforce such an order." Parker v. Enslow, 102 Ill. 272. It is believed that no other than the cases referred to can be found which deny the power of trial courts to require plaintiffs, in actions for personal injuries, to submit themselves to surgical examinations in respect thereto. Of these, one has been expressly and repeatedly overruled, another appears to have been decided without due consideration of the question and investigation of the adjudications upon it, and the third, and only other, alone remains as an authority for the nonexistence of the power. On the other hand, the Missouri cases, *supra*, an many others, concur in the establishment of the following propositions: (1) That trial courts have the power to order the surgical examination by experts of the person of a plaintiff who is seeking a recovery for physical injuries; (2) that the defendant has no absolute right to have an order made to that end and executed, but that the motion therefor is addressed to the sound discretion of the court; (3) that the exercise of that discretion will be reviewed on appeal, and corrected in case of abuse; (4) that the examination should be ordered and had under the direction and control of the court whenever it fairly appears that the ends of justice require the disclosure or more certain ascertainment of facts which can only be brought to light or fully elucidated by such an examination, and that the examination, may be made without danger to plaintiff's life or health, and without the infliction of serious pain; and (5) that the refusal of the motion, where the circumstances present a reasonably clear case for the examination under the rule last stated is such an abuse of the discretion lodged in the trial court as will operate a reversal of the judgment in plaintiff's favor. Thomp. Trials, § 859; Schroeder v. Railroad Co., 47 Iowa, 375; Railroad Co. v. Finlayson, 16 Neb. 578, 20 N. W. Rep. 860; Stuart v. Havens, 17 Neb. 211, 22 N. W. Rep. 419; Railroad Co. v. Thul, 29 Kan. 466; Turnpike Co. v. Baily, 37 Ohio St. 104; Railway Co. v. Underwood, 64 Tex. 463; Hatfield v. Railroad Co., 33 Minn. 130, 22 N. W. Rep. 176; Railroad Co. v. Childress, 82 Ga. 719, 9 S. E. Rep. 602; Sibley v. Smith, 46 Ark. 275; White v. Railway Co., 61 Wis. 536, 21 N. W. Rep. 524. The doctrine of these authorities has been fully recognized in Alabama in a case decided at the present term (McGuff v. State, 88 Ala. 147, 7 South. Rep. 35), and has quite recently been acted upon, by this court in a proceeding for divorce, even to the extent of requiring both the complainant and the respondent to submit their persons to expert physical examination. Anon., 7 South. Rep. 100. See, also, Anon., 35 Ala. 226. Indeed the propriety of a resort to this practice in divorce cases, even with respect to the defendant, has been long established. Devanbagh v. Devanbagh, 6 Paige, 175; LeBarron v. LeBarron, 35 Vt. 365; Newell v. Newell, 9 Paige, 25.

It is apparent from the adjudged cases that the

statement of the rule as to the revision of the trial court's action on a motion of this sort, to the effect that such action will not be interfered with unless it involves a manifest abuse of discretion, is inapt and misleading. What is really meant, the rule fairly deducible from the opinions is that if a proper case for granting the motion is clearly made, and is refused, the appellate court, having before it all the facts involved in the determination of the matter in the lower court, will reverse the judgment thus infected with error. An examination of these cases, which are most emphatic in holding this matter to be in the trial court's discretion, free from appellate interference except in the contingency of manifest abuse, demonstrates the soundness of the construction we have placed on them. The Missouri cases for example, while affirming the broad doctrine of non-interference except where discretion has been manifestly abused, in each instance give reasons for not reversing *nisi prius* action which show that that action, upon the strictest rules of appellate inquiry, was free from error. Thus the reason given in Shepard's Case was that "the order asked by the defendant was unreasonable in that it asked that this lady should submit to a personal examination, not by one skilled surgeon, but by at least three, * * * and this when she had once submitted to such an examination by Dr. Jackson, and again offered to submit to an examinantion by an eminent and reputable surgeon and physician of the city of St. Louis where the cause was pending, but this did not satisfy the defendant, who proposed to summon a number of physicians and surgeons to participate in the examination. Shepard v. Railway Co., 85 Mo. 634. The refusal of the motion in the case of Owens v. Railroad Co., 95 Mo. 169, 8 S. W. Rep. 350, was based on the ground that without such examination there was abundant evidence as to the nature, cause, and extent of the injuries complained of. In other words, the appellate court could see that a proper case had not been made for the examination, in that no necessity for it was shown, and the ends of justice could be met without it. The facts in Sidekum v. Railway Co., 93 Mo. 400, 4 S. W. Rep. 701, were strikingly like those arising on the motion in the present case so far as the testimony adduced by plaintiff is concerned. The application was made before the trial was entered upon and refused "for the time being." The supreme court says: "The action of the trial court upon said motion, as we have seen, was merely a refusal to grant the same for the time being, and, as the defendant did not renew its application for such order at any stage of the proceeding the court may have well concluded that, after hearing the said evidence in the cause introduced by plaintiff, including that of Dr. Bone, which we have given in substance [and which was of much the same character as that given by Dr. Drennen in the case at bar], defendant did not deem it necessary to renew his motion or to insist thereon, but had abandoned the same." The clear and necessary implication is that, had the motion been renewed on a state of facts precisely like those involved here, omitting the affidavits and evidence of the physicians called by the defendant, its refusal would have been error requiring the reversal of the judgment. What we have said applies also to the other cases cited, except that of Sibley v. Smith, 46 Ark. 295, which states the rule as deduced from the adjudged cases to be "that where the plaintiff, in an action for personal injuries, alleges that they are of a permanent nature, the defendant is entitled as a matter of right, to have the opinion of the surgeon upon his condition—an opinion based upon personal examination. In refusing to order the examination, as it may do when the evidence of experts is already abundant the circuit court must exercise a sound discretion, and its action is subject to review in case of abuse." And the judgment below was reversed, and the cause remanded really on the ground that a proper case had been made for the exercise of the court's discretion favorably to the application for an examination, and its refusal to so order was therefore a reversible error.

Guided by the rule deducible from these authorities rather than by the expressions used when they attempt a formulation of it, we shall consider whether the defendant clearly presented a case upon which the lower court should have ordered the examinatiou moved for. We are satisfied from the evidence which was before the court when the last application was made that such an examination would not have involved any ill consequences to the plaintiff. She had submitted to be so examined several times by Dr. Drennen safely and even without pain. The fact that she was of a nervous temperament or in a nervous condition involved no tenable objection, especially in view of the opium habit which she had contracted and which could, without hurt to her, have been utilized to allay nervousness. Her delicacy and refinement of feeling, though of course entitling her to the most considerate and tender treatment consistent with the rights of others cannot be permitted to stand between the defendant and a legitmate defense against her claim of a large sum of money. When it becomes a question of possible violence to the refined and delicate feelings of the plaintiff on the one hand and possible injustice to the defendant on the other, the law cannot hesitate. Justice must be done. Was it essential to the ends of justice that plaintiff should submit to this examination? We think it was.

It is true that Dr Drennen had made the examination and had fully deposed to the injuries complained of; but he was the plaintiff's physician and her witness. His sympathies were naturally with her, operating a bias in her favor even without consciousness of it on his part. Moreover, as we have said, his conclusions and opinions from the premises he testified to did not meet the approval or concurrence of the several other reputable surgeons and physicians who

were examined as to their conclusions from the facts stated by him. A serious doubt was thus raised as to what were the real facts in respect to the injuries. To a satisfactory solution of that doubt the examination moved for was essential. The result of such examination by skilled and disinterested surgeons under the directions of the court would necessarily have been either to put the plaintiff's claim in this regard on impregnable ground or to have destroyed it altogether; and, in either case, there would have been an unquestioned assurance that justice had been done—an assurance which finds no secure anchorage in the present record. Our opinion is that the court erred in overruling defendant's motion for the examination. * * * Reversed and remanded.

NOTE.—The questions involved in this case were presented to a court for adjudication in 1868, and it was then said, that no case, involving these points was to be found in the books.[1] The court was not deterred by the fact of novelty of the question, but considered that the administration of justice would be best subserved by the allowance of the examination asked, stating that countenance therefor was found in the examinations allowed in cases of mayhem, divorce for impotency, and *de ventre inspiciendo*. An appellate court overruled this view of the law, holding that divorce cases were peculiar and demanded such examinations to elicit the truth, and that the other proceedings were obsolete. It held, that such examinations were often shocking to modesty, and would no doubt prevent many females from instituting such suits, though they had meritorious causes of action. It also alluded to a proposition, on which none of the subsequent decisions have touched. Physicians are forbidden by the law of that State [New York] from testifying as to any information obtained in treating their patients. Can it be lawful then to compel a party to reveal, by exposure of the body and by answers to questions, which of course are necessary for a proper examination, facts to a physician, to which the latter may afterwards testify in court?[2] The question does not seem to have been yet presented to the appellate court of that State. The courts in Texas seem to incline to the opinion, that such examinations may be ordered if essential to the ends of justice, but evade a direct decision on the subject.[3] In Illinois in one case, it was *held*, that the court had no power to make such an order,[4] "but in a later case it was *held*, that the defendant had not suffered by the refusal of the order, and therefore such refusal could not be more than a harmless error, because such examinations had been allowed to him.[5] The first case in Missouri summarily denied the examination, because it was unknown to the practice and the law,[6] forgetting that law is a progressive science, and that nearly all the law of damage suits has been evolved within the last fifty years. In all the subsequent decisions of that court such examinations are considered to be within the power of the courts. All other decisions, which we have found, excluding those above mentioned, concede the power of the courts to order such examination upon the request of the defendants. They hold, however, that the matter is within the discretion of the court, and that such examinations are not to be ordered, unless they are essential for the ascertainment of the truth.[7] If however such examination is not essential, or if the defendant has had the benefit of the evidence to be obtained thereby, as by a prior examination or by the opportunities afforded him during the trial to examine the injuries, the order therefor will not be granted.[8] It was said in the New York case, which overuled the motion, that if the defendant were entitled to the compulsory exhibition of the body of the plaintiff, there might be some propriety in issuing the order.[9] In some courts the plaintiffs are allowed to exhibit to the jury their wounds or injured limbs, or may be required to perform physical acts before the jury, which will show the nature and extent of their injuries.[10] Other courts however hold this to be improper, one ground of objection being, that such evidence cannot be preserved in the bill of exceptions for the use of the appellate court.[11] When the order for an examination is allowed, it is considered that the demands of justice supersede the claims of modesty.[12] To guard against all abuse, such examinations must be made by physicians agreed upon by the parties or selected by the court, and the court should issue such orders as will prevent danger of life, injury to peace of body, or indignity of person.[13] Should the plaintiff refuse to submit to such examination, he may be punished for contempt, or his suit dismissed, or the allegations relative to such injury may be stricken out and withdrawn from the consideration of the jury.[14] Such order has often been applied for during the trial of the cause, and in two causes new trials were granted because the order was improperly refused, though it was requested after the plaintiff had finished his case.[15] In another cause such delay was *held* to justify a refusal to grant the order. Such orders should not be allowed to prolong the trial or prejudice the plaintiff in proving his case. If such order were granted after the plaintiff had finished his case, he could only rebut the evidence so obtained by a successful appeal to the discretion of the court to allow him to introduce new evidence on that point.[16] The better practice seems to be to apply to the plaintiff before the trial for permission to make the examination, and when the motion is made to support it by an affidavit, showing the plaintiff's refusal and also the probability that the examination will result in some material discovery or disclosure. The defendant should also offer to pay all the expenses of such examination.[17] If a proper case for an examination is established, and the court refuses to grant the order, there is such an abuse of judicial discretion, as will justify the reversal of a judgment in the plaintiff's favor.

S. S. MERRILL.

1 Walsh v. Sayre, 52 How. Pr. 334.
2 Roberts v. Ogdensburgh R. R., 29 Hun, 154.
3 Missouri P. R. R. v. Johnson, 72 Tex. 95; I. & G. R. R. v. Underwood, 64 Tex. 463.
4 Parker v. Enslow, 102 Ill. 272.
5 Chicago etc., R. R. v. Holland, 122 Ill. 461.
6 Loyd v. Hannibal etc., R. R. 53 Mo. 509.
7 I & G. R. R. v. Underwood, 64 Tex. 463.
8 Chicago, etc. R. R. v. Holland, 122 Ill. 461; Sioux City, etc. R. R. v. Finlayson, 16 Neb. 578; Stuart v. Havens, 17 Neb. 211; Atchison, etc. R. R. v. Thul, 29 Kan. 466.
9 Roberts v. Ogdenburgh, etc. 29 Hun, 154.
10 Schroeder v. Chicago, etc. R. R., 47 Iowa 375; Hatfield v. St. Paul, etc. R. R., 33 Minn. 130.
11 19 Cent. L. J. 144.
12 Schroeder v. Chicago, etc. R. R., *supra*.
13 Schroeder v. Chicago, etc. R. R., *supra*.
14 Schroeder v. Chicago, etc. R. R., *supra;* Miami, etc Co. v. Bailey, 37 Ohio, St. 104.
15 Atchison, etc. R. R. v. Thul, 29 Kan. 466; Sibley v. Smith, 46 Ark. 275.
16 Miami, etc. Co. v. Bailey, 37 Ohio St. 104.
17 Richmond, etc. R. R. v. Childress, 82 Ga. 719.

RECENT PUBLICATIONS.

A TREATISE ON THE LAW OF ROADS AND STREETS. By Byron K. Elliott and William F. Elliott, Authors of "The Work of the Advocate." Indianapolis: The Bowen-Merrill Company. 1890.

The high reputation and wide experience of Judge Elliot as a member of the Supreme Court of Indiana is such that our readers need not be told that he is capable of preparing a thoroughly good law book. He is the oldest, and, by common consent, the leading member of that court, and indeed in point of learning and ability, occupies a place in the front rank of the eminent jurists of this country. His opinions on the bench always exhibit great care, thought and laborious research, and contain terse, vigorous statemens tof the law. His son, who assists him in this work, as he did also in his very successful treatise on "The Work of the Advocate," is an attorney of high standing in Indianapolis. He is well known to the readers of this journal by his many vigorous and able articles and annotations to cases which have been published from time to time. The subject of roads and streets is well worth a text book. Though many treatises upon kindred topics have discussed questions of one kind and another within the confines of that subject it may be fairly stated that many of its branches are not treated in any modern work, nor indeed are they fully treated in any work. The book is evidently aimed to be and is of a practical character. The subjects are presented from the start to the finish without any unnecessary multipiicity of words and the citations of the cases illustrative of the text are exhaustive and complete throughout. We know of no better way to indicate its scope and character than to state succinctly the subjects of the chapters. It treats successively of public roads, streets and alleys, bridges, turnpikes, dedication, prescription, appropriation of property for roads and streets, what constitutes a taking, what property may be taken, extent of the taking, compensation, tribunals, petition, concerning procedure in appropriate cases, review by appeal and *certiorari*, locating and opening public ways for travel, urban and suburban servitudes, local control of roads and streets, improvement and repairs, drains and sewers in highways, assessments for improvements and repairs, neglect of duty to repair, obstructions and encroachment, personal liability of highway officers, rights and remedies of abutters, liabilities of abutters, highways as boundaries and incumbrances, street railways, railroad crossings, travel of roads and streets, procedure and damages in actions for personal injuries, abandonment, vacation and reversion. We observe that the reviewer for *Current Comment and Legal Miscellany* in a notice of this work, though he speaks in the main favorably of it, mentions some cases as having been overlooked by its authors on the general subject of the jurisdiction of States in the matter of bridges over navigable streams. He charges the author with having overlooked, or at least not given enough prominence to the cases of Gibbons v. Ogden, Wilson v. The Marsh Co., and the Wheeling Bridge Case. Common fairness and justice constrains us to say that if the reviewer had continued his investigation one-half page further than he seems to have done, he would have found those cases properly cited and commented upon. The fact is, that whatever defect the critical eye may discover in this work, we have given the book such study and have so much confidence in Judge Elliott, as to believe that it will not be a defect involving either his accuracy or his diligence. Where there is so much to commend it seems almost ungracious for us to find fault, especially in reference to a point not of substantial value. But it is to be regretted that the authors failed to make sections to the book with distinguishing section heads. As it is, each chapter treats of its subject, but the examiner finds it necessary to go through the entire chapter in order to study its branches. We are great believers in labor-saving devices for lawyers, and the suggestion above made, though it might not add anything to the intrinsic value of the work, would at least save the examiner time and labor in the search through its pages. But with this, criticism ceases, for the work is accurately prepared, is complete on the subject of which it treats, adds much of value to existing legal literature, and (what is not lightly to be considered), is beautifully printed, well indexed and bound.

HUMORS OF THE LAW.

The following is a translation nearly literal of the account of a recent French law suit, reported in the *Courier Des Etet Unis* of New York, and affords an excellent illustration of the great divergence between the civil and the common law:

The civil tribunal of Brest has recently been occupied with an affair of which the point of departure is among the most curious. Some years ago a notary of Brest named Bellamy was brought before the court of assizes of Finistere under the accusation of forgery. Among the witnesses for the defense who were heard was a rich wine merchant, M. Huet, who declared himself ready to pay a sum of 300,000 francs, if it was necessary, in order to save the accused. This testimony, aided by some other, influenced the jury, who, thinking that the creditors of Bellamy would lose nothing under such conditions, declared the accused not guilty. A little while later some new complaints were exhibited against Bellamy, who this time took flight, was condemned by contumacy and adjudged to hard labor for life. It is said he is really in Jersey. Bellamy's debts in liquidation being very important, the liquidator thought to compel M. Huet to execute his engagement and to pay the 300,000 francs. He considered that the promise before the court of assizes constituted a veritable pledge. On May 12th, 1888, the civil tribunal of Brest condemned M. Huet conditionally to pay the 300,000 francs in liquidation in case the debts exceeded the assets. This decision was affirmed by the court of appeals of Reimes.

M. Huet having raised a question of form, the case was again brought before the civil tribunal at Brest. The substance was pleaded. It was proved that the debts in liquidation were 1,300,000 francs in round numbers. Under these conditions M. Huet was condemned to pay the 300,000 francs promised and the legal interest. This affair has made an enormous noise in all the region.

A law recently passed in Denmark provides that all drunken persons shall be taken home in carriages at the expense of the dealer who sold the last glass.

"Are you in favor of prohibiting the sale of liquor?" asked an earnest-looking passenger of the man who sat down beside him.

"'Deed an' oi am that! It ought to be given away be the Government."

A long-winded lawyer was arguing a case "in banc," when seeing that one of the judges had fallen asleep, he suddenly stopped.

"I shall wait," he said, addressing the presiding judge with much dignity, "until your associate has finished his nap."

"Oh, you needn't wait for that," was the disconcerted reply; "he's sure not to wake until you're quite done, counselor."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATOR'S SALE OF LAND.—An administrator's petition for the sale of his intestate's lands for the purpose of distribution, and the order directing the sale, described the lands as an entire tract, "containing in all 596 acres, more or less, less or except the widow's dower, described as follows." Then followed a description of about 200 acres of the land, as given in a previous dower allotment to the widow: *Held*, that the exception was not of the fee, but of the dower estate.—*Austin v. Willis*, Ala., 8 South. Rep. 94.

2. ADVANCEMENTS—Fraudulent Conveyances.—Where a father furnishes money with which to purchase land in the name of his son, without any contemporaneous understanding or agreement concerning repayment of the purchase money, the son does not thereby become the father's debtor, since the presumption is that the payment was an advancement.—*Higham v. Vanosdal*, Ind., 25 N. E. Rep. 140.

3. ADVERSE POSSESSION—Interruption.—One in possession of land under a tax deed, which was insufficient to vest the title in him, cannot claim title by adverse possession where it is shown that, within the time required to perfect such title, there was a judgment against his tenant, in possession of part of the land, in favor of a grantee of the former owner, under which such grantee was put in possession.—*McGrath v. Wallace*, Cal., 24 Pac. Rep. 793.

4. ADVERSE POSSESSION—Water Lots.—Act Cal. March 26, 1851, which grants the use of certain beach and water lots to the city of San Francisco for 99 years, with the proviso that the city shall pay into the State treasury, within 20 days after their receipt, 25 per cent. of all moneys arising from the sale of the property, does not create a trust in the city in favor of the State, so far as the land itself is concerned; and hence the city's title to such land is subject to extinguishment by adverse possession under the statute of limitations.—*City and County of San Francisco v. Straut*, Cal., 24 Pac. Rep. 814.

5. ANIMALS—Injuries.—In an action for damages for a dog-bite the evidence showed that defendant owned the dog, knew it was vicious, and failed to confine it, and that the dog bit plaintiff while he was moving at a rapid pace on a highway, and talking in a somewhat loud tone: *Held*, that the evidence did not justify a verdict for defendant.—*Dockerty v. Hutson*, Ind., 25 N. E. Rep. 144.

6. APPEAL—Clerk of Court.—The clerk, a ministerial officer of the court, has not the legal right to question the correctness of the court's minutes, and plead the nullity of the order of the appeal, in that the presiding judge did not sign them on the last day of the term, as a ground not to make the transcript of appeal in a criminal case.—*State v. Mayo*, La., 8 South. Rep. 52.

7. APPEALABLE ORDER.—Where a testator appoints his wife to manage the estate, and in the event of her death before his grandchildren, who are to succeed her in the trust, come of age, then the trust to devolve upon his son, and the wife voluntarily renounces the trust, and procures an order substituting the son as trustee, no appeal lies from a subsequent order vacating the first, as it is not enumerated among the appealable orders in Code Civil Proc. Cal. § 963.—*In re Moore's Estate*, Cal., 24 Pac. Rep. 816.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS—Preferences.—Under Code Va. § 2874, providing that no assignment made by an insolvent special partnership for the purpose of giving preferences shall be valid, creditors who have filed bills against a special partnership which has made such an assignment, under Code Va. § 2460, providing that suits may be brought by creditors to avoid assignments with intent to delay, hinder and defraud creditors, prohibited by section 2458, and that the creditors filing such bills shall have a lien on the property of the partnership from the date the bills are filed, are not entitled to have their full claim paid out of the assets of the firm according to the dates of filing their bills, to the exclusion of other creditors.—*Rothchild v. Hoge*, U. S. C. C. (Va.), 43 Fed. Rep. 97.

9. ATTACHMENT BOND—Damages.—Where a statute provides that in an action upon an attachment bond the damages are actual only, if the attachment was sued out "wrongfully," but may be exemplary also if sued out "vexatiously," and the complaint avers that the attachment was sued out "wrongfully" and "vexatiously," but fails to assign a breach sufficient to recover exemplary damages, the words "and vexatiously" are surplusage, and not grounds for a demurrer to the whole complaint.—*McLane v. McTighe*, Ala., 8 South. Rep. 70.

10. CARRIERS—Connecting.—In an action for failure to deliver goods at their destination on a connecting line, for which goods defendant railroad company issued a bill of lading, limiting its liability to damages occurring while the goods were under its control, it is proper to refuse to direct a verdict for defendant where the evidence fails to show that the goods were delivered safely to the connecting line.—*Georgia Pac. Ry. Co. v. Hughart*, Ala., 8 South. Rep. 62.

11. CARRIERS—Connecting Lines.—Where a bill of lading, containing a clause limiting the liability of each connecting road to loss or injury suffered while the goods are on its line, is accepted by the shipper, there is a legitimate limitation of liability, which is binding on each of the contracting parties, even though the shipper was unable to read, and did not know that the limiting clause was in the bill of lading. Distinguishing Railroad Co. v. Meyer, 78 Ala. 597.—*Jones v. Cincinnati, S. & M. Ry. Co.*, Ala., 8 South. Rep. 61.

12. CARRIERS—Limitation of Liability.—A railroad company cannot limit its liability to a shipper for the death

of a horse caused by the negligence of the company, by a provision in the shipping contract that should damage occur for which the railroad company might be liable, the amount claimed should not exceed, "for a horse or mule, $100," there being no agreement that this was the value of the horse.—*Louisville & N. R. Co. v. Wynn*, Tenn., 14 S. W. Rep. 311.

13. CARRIERS—Loss by Fire.—In an action against a railway company to recover for certain cotton shipped by plaintiff, and which had been destroyed by fire, it appeared that the bill of lading contained a clause exempting the railway company from loss by fire: *Held*, that the burden was on the plaintiff to show that the loss was due to the negligence of the defendant, and such a negligence would not be presumed from a mere proof of loss.—*Louisville & N. R. Co. v. Manchester Mills*, Tenn., 14 S. W. Rep. 314.

14. CARRIERS OF GOODS—Delay.—Where the initial carrier in its bill of lading issued to plaintiffs undertook to transport goods to their destination without any mention of connecting lines, in an action for damages caused by delay against the last carrier, which was not a party to the contract, it is error to instruct that if defendant was one of the connecting lines over which the goods were shipped it would be liable for unreasonable delay, whether such delay occurred on its own line or not.—*East Tennessee, V. & G. Ry. Co. v. Johnson*, Ga., 11 S. E. Rep. 809.

15. CARRIERS OF PASSENGERS—Destination.—Plaintiff applied to defendant's ticket agent for a ticket to go on the limited train to a certain point. The ticket was refused, because the limited train did not stop at that point. Plaintiff then applied to the conductor, who told her to get on the limited train without a ticket, and that he would let her off at her destination; but she was carried to the station beyond her destination. It appeared that there was another daily train which stopped at plaintiff's station: *Held*, that plaintiff had sufficient notice that any agreement the conductor might make to put her off at the place she named would be a violation of the rules of the company, and no recovery can be had of the company because of the conductor's failure to keep his agreement.—*Alabama G. S. R. Co. v. Carmichael*, Ala., 8 South. Rep. 87.

16. CARRIERS OF PASSENGERS—Negligence.—In an action for personal injuries sustained while leaving a horse-car, plaintiff's evidence tended to show that the car was standing still when she attempted to get off, and was started with a jerk as she was stepping to the ground, while the evidence of defendant showed hat plaintiff was entirely free from the car before it was again started: *Held*, that defendants' requests for instructions which based its right to a verdict upon the assumption "that the moment plaintiff started to get off was simultaneous with the starting of the car," and that the car was in motion when she attempted to get off, were properly refused.—*Birmingham Union Ry. Co. v. Smith*, Ala., 8 South. Rep. 86.

17. CHATTEL MORTGAGES.—A mortgage of personalty is a "conveyance of property" within the meaning of Code Ala. 1886, § 1798, admitting such conveyances in evidence, without further proof of execution, when they have been acknowledged or proved and recorded, as required by law.—*Patterson v. Jones*, Ala., 8 South. Rep. 77.

18. CIVIL DAMAGE ACT—Damages.—In Michigan, under the civil damage act, a wife may sue for loss of means of support by the sale of liquor to her husband, though for ten years he has been an habitual drunkard, and given nothing for her support.—*Rouse v. Melsheimer*, Mich., 46 N. W. Rep. 372.

19. CLERK OF COURT—Damages.—Where an appellant loses his right of appeal through the failure of the clerk to furnish him a copy of the bill of exceptions within the proper time, the clerk is liable for such damages as appellant has sustained by reason thereof. —*Houston v. Wandelohr*, Ky., 14 S. W. Rep. 345.

20. CONDITIONAL SALE — Evidence. — The evidence examined and *held* not to establish a conditional sale.—*Davis v. Giddings*, Neb., 46 N. W. Rep. 425.

21. CONSTITUTIONAL LAW—City Charters.—Const. Cal. art 11, § 8, provides for the preparation and adoption of a charter for any city, which shall be submitted to the legislature, and adopted by it, or rejected, "without power of alteration or amendment;" but requires such charter to be "consistent with and subject to the laws of the State;" and section 6 provides that all charters "shall be subject to and controlled by general laws:" *Held*, that St. Cal. 1889. p. 70 providing for the opening and widening of streets within municipalities, being a general law, is applicable to the city of Los Angeles, though its charter was framed under said section.—*Davies v. City of Los Angeles*, Cal., 24 Pac. Rep. 771.

22. CONSTITUTIONAL LAW—Quo Warranto—Elections. —The provision of the statute of February 2, 1872, (McClel. Dig. 846), which authorizes any person claiming title to any office exercised by another to file an information in the name of the State against the person exercising the same, and to set up therein his own claim, upon the refusal of the attorney general to do so, is constitutional.—*State v. Anderson*, Fla., 8 South. Rep. 1.

23. CONSTITUTIONAL LAW—Taxation.—The act approved October 16, 1889, conferring upon the mayor and council of the city of Athens power "to construct, pave, and otherwise improve sidewalks in said city, and to assess and collect the cost thereof out of the real estate abutting on the sidewalk so constructed, paved, or otherwise improved," is not in violation of the constitutional requirement that taxation shall be *ad valorum* and uniform, such assessments not being "taxation," within the meaning of the constitution.—*Speer v. Mayor*, Ga., 11 S. E. Rep. 802.

24. CONTINUANCE—Surprise.—Defendant moved for a continuance on the ground of surprise, in that there was a material alteration in an instrument executed by him, and introduced in evidence by plaintiff, as he expected to show by a witness, to obtain whose attendance the continuance was asked. He saw the instrument with the interlineation coming from plaintiff's possession the day before he moved for the continuance, and he did not make such motion as soon as plaintiff's evidence was in, but proceeded to examine witnesses as to the execution of the instrument: *Held*, that it was not error to refuse the continuance.—*McLear v. Hapgood* Cal., 24 Pac. Rep. 788.

25. CONTRACT—Rescission.—A bill to rescind a sale of land on the ground of the vendor's misrepresentations as to the proximity of the property to a certain town is not sustained by proof that, after the transaction had been fully closed, the vendor casually remarked that he understood the land was within a mile and a quarter of the town in question, when, in fact, it was four miles away.—*Porter v. Collins*, Ala., 8 South. Rep. 80.

26. CORPORATIONS—Salary of Officers.—Though a vote of the directors of a corporation fixing the treasurer's salary at a certain sum has been recorded in the minutes, in an action for such salary, parol evidence is admissible to show that, at the time the vote was passed, it was understood that it was not to be binding unless negotiations then pending were successfully concluded, which would enable the corporation to comply with the terms of its charter, and to begin operations.—*Sears v. Kings County El. R. Co.*, Mass., 25 N. E. Rep. 98.

27. COUNTER-CLAIM.— A counter-claim based on a contract of purchase being in the nature of a cross-action, the defendant is not compelled to interpose it in an action of ejectment as a defense. If he so elect, he may bring a separate action to enforce the contract, subject, however, to a liability to pay the costs in the second case.—*Uppfalt v. Woreman*, Neb., 46 N. W. Rep. 419.

28. COUNTY SUPERINTENDENT—Election.—Where all the members of a board consisting of eight township trustees meet at the proper time and place for electing a county superintendent, and, after electing a chair-

man in an irregular manner, it is properly moved that a certain person be elected superintendent, and four trustees vote for him, and the others refuse to vote, he is legally elected.—*State v. Dillon*, Ind., 25 N. E. Rep. 136.

29. CRIMINAL EVIDENCE—Gambling.—On an indictment under Pen. Code. Cal. § 330, for playing the game of "tan," where the policeman who arrested defendant has testified that he did not see defendant engage in the game that was being played, it is error to allow him to testify that from the position defendant occupied at the table, he supposed that he was the banker, since that is a mere opinion of the witness.—*People v. Ah Own*, Cal., 24 Pac. Rep. 780.

30. CRIMINAL EVIDENCE—Gaming.—On a criminal prosecution for fraudulently winning money by means of the game of bunco, it is error to permit a witness to describe, as an expert, not the game actually played by defendants, but the game of bunco generally.—*People v. Hood*, Cal., 24 Pac. Rep. 817.

31. CRIMINAL EVIDENCE—Larceny.—At a trial for larceny, where defendant claims to have won the property alleged to have been been stolen at cards, error, if any, in permitting the foreman of a grand jury to disclose statements to the same effect, made by defendant when a witness before that body in another investigation, is not prejudicial to defendant.—*Pellum v. State*, Ala., 8 South. Rep. 83.

32. CRIMINAL LAW—Homicide.—The last paragraph of an instruction on manslaughter was: "But if you find from the evidence that in truth and in fact the deceased or his associates intended no such assault nor the commission of a felony, and a reasonable person in defendant's position would not have so believed, and the defendant had no reasonable cause for so believing, such killing by the defendant, without malice, but without sufficient cause, real or apparent, will constitute the crime of manslaughter." The other seven paragraphs most clearly and correctly laid down the law on the subject: *Held* that, as the rest of the instruction was free from ambiguity, and the only trouble with this paragraph was its grammatical construction, the jury would not be considered to have been misled by it.—*People v. Alselmi*, Cal., 24 Pac. Rep. 810.

33. CRIMINAL LAW—Larceny.—Crim. Laws Mont. § 78, provides that if any person shall steal a "mare, gelding, stallion, colt, foal, or filly" he shall be deemed guilty of grand larceny. Defendant was indicted for stealing "one * * * horse, a gelding, about three years old." All the witnesses for the State at the trial described the animal simply as a "horse" or "colt:" *Held*, that the variance was fatal, and a new trial would be granted.—*State v. McDonald*, Mont., 24 Pac. Rep. 628.

34. CRIMINAL LAW—Province of Court and Jury.—On a trial for robbery, a charge that the jury is bound to presume that the prosecuting witness states the truth, the defendant not having proven the falsity of his statements, is an invasion of the province of the jury, and erroneous under Const. Cal. art. 6, § 19, which declares that "judges shall not charge juries with respect to matters of fact."—*People v. Murray*, Cal., 24 Pac. Rep. 802.

35. CRIMINAL LAW—Reasonable Doubt.—An instruction that "the doubt which requires an acquittal must be actual and substantial, not mere possibility or speculation; it is not a mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt"—is unobjectionable.—*Little v. State, Ala.*, 8 South. Rep. 82.

36. CRIMINAL PRACTICE—Escape.—Under Pen. Code Tex. art. 218, as amended by Act. March 1, 1887, providing that county convicts hired out may be discharged at any time during the term of hire on payment of the fine and costs, or at the expiration of the term, the information against such convict for escape need not allege that the fine and costs have not been paid, nor that the term of hire has not expired.—*Carter v. State*, Tex., 14 S. W. Rep. 350.

37. CRIMINAL PRACTICE—Grand Jury.—A plea in abatement to an indictment alleged that one "A. C. Milford," who acted as a grand juror in finding an indictment, had not been selected or drawn as a grand juror. The replication alleges that there was duly drawn from the jury-box a slip of paper on which was written "A. C. Nilford, farmer, beat 13," that the sheriff summoned "A. C. Milford, farmer, beat 13," who appeared and served on the grand jury, and that there was no person in the beat or county as "A. C. Nilford," but that "A. C. Milford," a farmer, had for many years resided in beat 13: *Held*, that the reply was fatally defective in that it failed to allege with sufficient certainty that Milford was the man selected.—*Cochrun v. State*, Ala., 8 South. Rep. 78.

38. CRIMINAL PRACTICE—Judge.—Where the presiding judge of the court is incompetent to try the case by reason of his relationship to the prosecutor, it is erroneous for him to make orders setting a day for the trial, determining the number of special jurors to be drawn and summoned, and the manner of drawing them.—*Salm v. State*, Ala., 8 South. Rep. 66.

39. DECEIT—Mistake of Law.—Plaintiff, being about to enter into a contract with a corporation for loans and advances to it to a large amount, provided its debts had been accurately stated, for the purpose of verifying said statement, asked the defendant bank how much the corporation owed it. Defendant told him a certain amount, which did not include notes given to it by a third person for money actually loaned for the benefit of and received by said corporation, liability for which was denied by said corporation, and not understood, at the time, by the officer who gave the reply. The bank acted in good faith. Plaintiff, relying upon the correctness of the answer, entered into the contract. The bank afterwards claimed that the corporation was liable upon said notes, sued it thereon, the corporation went into insolvency, and great loss was suffered by plaintiff. In an action of deceit, *held*, that defendant was not liable, its representation having been made in good faith, the mistake which caused the misrepresentation being a mistake of law upon a state of facts which were imperfectly understood.—*Farrel v. National Shoe & Leather Bank*, U. S. C. C. (Conn.), 43 Fed. Rep. 123.

40. DEED—Delivery.—The grantor in a deed of trust, made to effect a settlement in favor of his wife and children, was named as one of the trustees therein. The deed was duly executed and acknowledged, and the other trustee, who was present at its execution, consented to act. The deed remained in the possession of the grantor, but he had it recorded, and afterwards in his will he recognized it as an existing trust: *Held*, that there was a sufficient delivery of the deed.—*Huse v. Den*, Cal., 24 Pac. Rep. 790.

41. DEED—Indian Title.—The treaty with the Kickapoo Indians provided that the land allotted to the Indians could not be sold to white men without permission of the president, which permission should be signified by his causing the land to be patented to the Indians "with power of alienation," and that before receiving patent the Indians must appear before the district court, make proof of their intelligence and ability, and take the oath of allegiance. An Indian conveyed his land by warranty deed on the day he made such proof, and after he had obtained his patent conveyed the land to another grantee: *Held*, that the second grantee took the land, since the first deed, being made before patent, was ineffectual to convey the land, either directly or by estoppel.—*Briggs v. Sample*, U. S. C. C. (Kan.), 43 Fed. Rep. 102.

42. DEED — Quitclaim. — A subsequent purchaser against whom an unrecorded conveyance is void, under section 3627, Ann. Code Oreg., must be a purchaser in good faith and for a valuable consideration, of "the same real property, or a portion thereof," included in

the unrecorded conveyance, and must be a purchaser under a form of conveyance or other instrument which purports to convey the property. Hence a purchaser under a mere quitclaim deed, which only purports to remise, release and quitclaim the right, title and interest of the grantor in and to the property will not be regarded "a purchaser of the same real property, or any part thereof."—*American Mortgage Co. v. Hutchinson*, Oreg., 24 Pac. Rep. 515.

43. DIVORCE—Adultery.—Where the ground on which divorce is sought is adultery on the part of the wife, the court must be convinced of her guilt before granting a separation in any case, and nothing more than this is required, even if there is evidence of the husband's neglect of the wife.—*Patterson v. Patterson*, N. J., 20 Atl. Rep. 347.

44. EASEMENT—Party-Walls.—Plaintiff and defendant owned adjacent houses. Instead of there being a separate wall for each house on the line between the lots, there was but one wall for both houses, half of which was on each lot. The common grantor of plaintiff and defendant conveyed each house by a description of each lot which made the dividing line of the lots pass through the center of the party-wall, though there was no reference to it: *Held*, that there was an implied grant to the party-wall, putting on each the burden and privilege of a party-wall.—*Carlton v. Blake*, Mass., 25 N. E. Rep. 83.

45. EMINENT DOMAIN—Tender.—Where a railroad company has failed to agree with a land owner as to the amount of damages to be paid by it for crossing his land, and commissioners are appointed under the New Jersey statute, a tender of the amount awarded by them before their award is filed in the office of the clerk is not such a tender before appeal from the award as under the statute will protect the railroad company in entering on the land without waiting for the determination of the appeal taken from the award as soon as it is filed.—*Pomona Branch R. Co. v. Camden & A. R. Co.*, N. J., 20 Atl. Rep. 350.

46. EMINENT DOMAIN—Value.—A witness testifying as an expert as to the value of land, having based his opinion in part on sales of other lands known to him, not in themselves competent evidence of such value, he cannot to sustain his opinion state the prices paid at such sales.—*Hunt v. City of Boston*, Mass., 25 N. E. Rep. 82.

47. EQUITY—Rescission.—Complainant sold his land in Alabama to defendant for a cash payment and an interest in certain lands in Florida. Complainant knew nothing of the Florida lands, and relied on defendant's representations as to its quality and value, which representations were untrue: *Held*, that, as defendant had made extensive improvements on the Alabama land before receiving notice of a claim for rescission, and the parties thereof could not be placed *in statu quo*, entire rescission was forbidden.—*Bullock v. Tuttle*, Ala., 8 South. Rep. 69.

48. EXECUTION—Claims of Third Parties.—Code Ala. 1886, §§ 3365, 3368, provide that, where property levied on under a justice's execution is claimed by one not a party to the writ, claimant may try title, first making affidavit of title and giving a bond, and, if judgment is against claimant, and he fails to restore the property, the levying officer must return the bond endorsed "Forfeited," and thereupon execution shall issue against the obligors in the bond. *Held*, that the return of the levying officer was a condition precedent to the issuing of such execution.—*Catching v. Bowden*, Ala., 8 South. Rep. 58.

49. FEDERAL COURTS—Injunction.—Under Rev. St. U. S. § 720, which forbids federal courts from staying proceedings in State courts except in bankruptcy matters, a federal court will not, pending a condemnation suit in a State court, enjoin the petitioner from entering upon the land sought to be condemned.—*Dillon v. Kansas City S. B. Ry. Co.*, U. S. C. C. (Mo.), 43 Fed. Rep. 109.

50. FRAUDS, STATUTE OF—Contracts.—A contract by which defendants agree to pay plaintiffs a certain sum per acre for all land that plaintiffs shall examine and advise defendants to buy is not one for the purchase or sale of real estate, and hence is not required to be in writing by Civil Code Cal. § 1624.—*Wilson v. Morton*, Cal., 24 Pac. Rep. 784.

51. FRAUDULENT CONVEYANCES.—A conveyance of land by an insolvent debtor to trustees for the benefit of certain creditors, to the exclusion of others with a reservation of the surplus to the debtor's wife, is not fraudulent.—*Hays v. Hostetter*, Ind., 25 N. E. Rep. 134.

52. FRAUDULENT CONVEYANCES.—Where one of the terms of the sale of his business by an insolvent debtor is that he is retained in the management thereof at a salary, there is a benefit secured to him which renders the transaction fraudulent as against creditors.—*Stephens v. Begenstein*, Ala., 8 South. Rep. 68.

53. FRAUDULENT CONVEYANCES—Subsequent Purchasers.—Under Code Ala. § 1735, which declares that all conveyances made with intent to defraud creditors or purchasers shall be void as to such persons, a voluntary conveyance made to defraud creditors is void as to a subsequent purchaser for value from the grantor, though he had notice of the former conveyance.—*Gilliland v. Fenn*, Ala., 8 South. Rep. 15.

54. GAMBLING—Bucket-Shops.—Under Rev. St. Ill. 1889, ch. 38, § 137*a*. which forbids the keeping of any "bucket-shop" or place where the pretended buying and selling of stocks or produce without any intention of receiving or delivering the property sold is carried on, and which provides that any person who keeps such place either individually or as agent shall be punished, it is no defense to a charge of violating said section that defendant acted in the matter as agent for a Chicago firm, who executed the orders received by him.—*Soby v. People*, Ill., 25 N. E. Rep. 109.

55. GARNISHMENT — Service.—How. St. Mich. § 8087, which provides for garnishment proceedings against a non-resident principal "defendant," has no application to cases in which there are several non-resident defendants, as the statute will not be extended to include cases not within its express provisions. Ford v. Dry-Dock Co., 15 N. W. Rep. 509, approved.—*Wilson v. Reilly*, Mich., 46 N. W. Rep. 439.

56. GUARDIAN AND WARD—Investment of Ward's Property.—Under Act Ky. April 29, 1890, which authorizes persons holding funds in a fiduciary capacity, for loan or investment, to invest the same in real estate, mortgage notes or bonds, "or in such other interest-bearing or dividend-paying securities as are regarded by prudent business men as a safe investment," a guardian of minor children will not be compelled to change an investment made by their deceased father in the stock of a prosperous and well-managed national bank, paying an annual dividend of 12 to 14 per cent.—*Fidelity T. & S. V. Co. v. Glover*, Ky., 14 S. W. Rep. 343.

57. HIGHWAYS —Condemnation.—On proceedings to condemn a right of way for a public highway, where the owner of the land claims damages for the additional fencing required, it is a question for the jury whether the land is worth fencing for any use to which it may be put.—*Colusa County v. Hudsoon*, Cal., 24 Pac. Rep. 791.

58. INJUNCTION—Laches.—Where defendants consent to waive all defenses, and confess judgment on the strength of a verbal agreement that plaintiffs will stay execution for a year, they cannot enjoin a sale under the execution which plaintiffs levied before the end of the year, being guilty of laches in standing by and permitting the execution to be levied without moving the court to recall it.—*Moulton v. Knapp*, Cal., 24 Pac. Rep. 803

59. INSURANCE—Homestead.—A provision in a policy that no action for a loss thereunder shall be maintained unless an award of damages by arbitraitors, in case of a difference between the parties as to the amount of loss or damage, shall first have been returned, does not necessitate as a condition precedent to the bringing of

an action that there be a submission to arbitration, where the insurance company denies its liability to pay any sum.—*Bailey v. Ætna Ins. Co.*, Wis., 46 N. W. Rep. 440.

60. INSURANCE COMPANIES—Insolvency.—Under Rev. St. Wis. §§ 3218, 3219, power was given for a court to take jurisdiction of an action brought by a creditor or stockholder to wind up the business of a mutual insurance company, to grant writs of injunction, and appoint a receiver.—*In re Oshkosh Mut. Fire Ins. Co.*, Wis., 46 N. W. Rep. 441.

61. INSURANCE COMPANY—Receivers.—The receiver of a corporation appointed in a foreign jurisdiction will be allowed to sue to foreclose a mortgage given to the company on land in Alabama where no creditor of the corporation asserts any rights, and ample opportunity has been afforded for that purpose, and only the parties litigant are interested.—*Boulware v. Davis*, Ala., 8 South. Rep. 84.

62. INSURANCE COMPANIES—Service.—Under a petition upon an insurance policy which avers that the company's chief office is in Louisville, Jefferson county, and that it, through its duly and regularly authorized agent in Allen county, issued to the said L. D. Logan a certificate of membership," etc., a judgment by default in Allen county was valid, though service was made upon the chief officer in Jefferson county.—*Kentucky M. S. F. Co. v. Logan's Adm'r*, Ky., 14 S. W. Rep. 337.

63. INTERNATIONAL AND CONSTITUTIONAL LAW—Fisheries.—As between nations, the minimum limit of the territorial jurisdiction of a nation over its tide-waters is a marine league from its coast; and bays wholly within its territory, not exceeding two marine leagues in width at the mouth, are within this limit. This territorial jurisdiction includes the right of control over fisheries, whether the fish be floating or shell fish.—*Commonwealth v. Manchester*, Mass. 25 N. E. Rep. 113.

64. INTOXICATING LIQUORS—Indictment.—On a trial for a violation of Code Ala. § 629, requiring a license for engaging in the business of selling "vinous, spirituous, or malt liquors," the evidence showed that defendant sold a bitters which was an intoxicating liquor, but there was nothing to show its ingredients: *Held*, that whether the bitters was vinous, spirituous, or malt liquor, or contained liquors of either or all of these classes in appreciable quantities, was a question of fact for the jury.—*Allred v. State*, Ala., 8 South. Rep. 56.

65. JUDGE—Term of Office.—Act Cal. March 5, 1887, increased the number of judges of the superior court in San Bernardino county from one to two, and provided that the governor should appoint an additional judge of said court "who shall hold office until the first Monday after the 1st day of January, A. D. 1889, and at the next general election a judge of said court of said county shall be elected to hold office for the term prescribed by the constitution and the law." The next general election was in November, 1888. Const. Cal. art. 6, § 6, prescribes six years as the term of office of a superior court judge: *Held*, that, there being no provisions to the contrary, the judge thus elected held office for six years from said January 1st, though the term of the other judge would expire, and another judge be elected to the vacancy before the expiration of that time.—*People v. Watermam*, Cal., 24 Pac. Rep. 807.

66. JUDGMENT—Parties.—Where a bill for foreclosure makes a certain person defendant as executor and as guardian, and the return to the process shows that he was served as executor and guardian, and the bill states that he has an individual interest in the mortgaged land, a decree of foreclosure binds him as well in his individual as in his representative capacity.—*Cornell v. Green*, U. S. C. C. (Ill.), 43 Fed. Rep. 105.

67. JUDGMENT BY DEFAULT—Motion to Set Aside.—An order denying or granting a motion, under Code Civil Proc. Cal. § 473, to set aside a default on the ground of mistake, inadvertence, surprise or excusable neglect rests in the discretion of the trial court, which will no be interfered with on appeal except in a plain case of abuse; and, where the motion is based on the fact that defendant failed to observe what county was named in the summons, the order of the court refusing to set aside the default will not be disturbed.—*Garner v. Erlanger*, Cal., 24 Pac. Rep. 805.

68. JUSTICE OF THE PEACE—Judgment.—Under How. St. Mich. § 6947, providing that, on an affidavit by the party or his attorney that there are not sufficient chattels to satisfy the judgment, the justice of the peace shall issue a transcript, the affidavit need not be by the attorney of record, but it may be made by any other whose authority may be proved by his deposition in the affidavit itself.—*Berkery v. Reilly*, Mich., 46 N. W. Rep. 436.

69. JUSTICE OF THE PEACE—Misconduct.—Under Pen. Code Cal. §§ 1385, 1386, on an indictment of a justice for taking jurisdiction of a criminal proceeding after it has been dismissed before another justice of the same township by order of the prosecuting attorney, and brought before a justice of another township it is error to instruct that the district attorney has authority to dismiss a criminal prosecution before a justice of the peace.—*People v. Ward*, Cal. 24 Pac. Rep. 785.

70. LANDLORD AND TENANT.—Code Ala. § 3391, and § 3411, are not repugnant, the former being intended to apply to cases where a tenant holds over after his term has expired, and the latter to all other cases of unlawful detainer.—*Lykes v. Schwarz*, Ala., 8 South. Rep. 81.

71. LIMITATION OF ACTIONS—Res Adjudicata.—Rev. St. Ind. 1881, § 292, which bars actions for relief against fraud after six years, does not apply to an action to set aside a sale, because made to one who stood in a fiduciary relation to the property sold.—*Wilson v. Brookshire*, Ind , 25 N. E. Rep. 131.

72. MASTER AND SERVANT—Negligence.—Under St. Mass. 1887, ch. 270, (employers' liability act), making an employer liable for an injury to an employee, from the negligence of one in the employer's service intrusted with and exercising superintendence, an employee engaged in blasting rocks does not assume as one of the risks of his employment that the superintendent will negligently attempt to clear out a hole which had been charged with powder, by drilling into it, before ascertaining that the charge had exploded.—*Malcolm v. Fuller*, Mass., 25 N. E. Rep. 83.

73. MECHANICS' LIENS.—Code Civil Proc. Cal. § 1184, applies only to those contracts where the price to be paid thereunder exceeds $1,000, as provided by section 1183; and, where the contract price does not exceed $1,000, the reputed owner may pay the whole of it to the contractor, either before the commencement of the work or during its progress, unless a written notice is served on him by the laborers or material-men, that they have performed labor for, or furnished material to, the contractor, or that they have agreed so to do, as prescribed by section 1184.—*Kerckhoff-Cuzner M. & L. Co. v. Cummings*, Cal., 24 Pac. Rep. 814.

74. MORTGAGES — Absolute Deed.—In determining whether an absolute conveyance of land, together with a contract to reconvey upon payment of a fixed sum on a future day, constitutes a mortgage or not, the court will look at all the circumstances, the most important of which are: (1) Is there an obligation on the part of the grantor to pay the purchase money which is enforceable at law? (2) Is the land conveyed worth considerably more than the purchase price? (3) Does the grantor retain possession of the land granted upon terms of paying a rent equal to the interest on the purchase price?—*Pace v. Bartles*, N. J., 20 Atl. Rep. 352.

75. MORTGAGES—Consideration.—A wife joined her husband in executing a mortgage of the homestead, declared on community property, to secure notes made by the husband. He shortly afterwards died, and she became his administratrix, and published the notice required by law to creditors to present their claims within four months. The holders of the notes and mortgage failed to present them within the pre-

scribed time, so that they became barred; but the administratrix, in ignorance of this fact, executed another mortgage to secure these notes and others made by her: *Held*, that this mortgage was without consideration in so far as it secured the husband's notes secured by the first mortgage.—*Rosenberg v. Ford*, Cal., 24 Pac. Rep. 779.

76. MORTGAGES — Foreclosure — Attorneys' Fees.—Where a mortgage provides for a reasonable attorney's fee, testimony may be taken by the court, or a master, to ascertain what a reasonable fee in the case is; but it is error to allow the fee without taking such testimony.—*Long v. Herrick*, Fla., 8 South. Rep. 50.

77. MORTGAGES—Lien.—Where one, without the consent of the mortgagee, puts a house on mortgaged land, the right of the mortgagee to sell it as part of the mortgaged property is not affected by the fact that it was put on under an agreement with the mortgagor that it should be and remain the personal property of the party putting it on.—*Meagher v. Hayes*, Mass., 25 N. E. Rep. 105.

78. MORTGAGES — Married Women.—Land was conveyed to a married woman, and she and her husband executed their promissory note under seal for part of the price. To secure this note, the vendor took a mortgage on the land, which recited that "for and in consideration of a certain deed of land given, and my promissory note for part price thereof, * * * we do hereby sell and convey," etc. Both husband and wife signed the mortgage, but neither their name nor any other name appeared in the body thereof: *Held*, that the mortgage was sufficiently executed. Distinguishing Harrison v. Simons, 55 Ala., 510.—*Sheldon v. Carter*, Ala., 8 South. Rep. 63.

79. MORTGAGE FORECLOSURE—Duress.—It is no defense to a suit for foreclosure, where the only defendants are purchasers of the equity of redemption, that the mortgage note was executed under duress and for an illegal consideration, and that one of the mortgagors was a married woman, since such matters constitute at most only a personal defense.—*West v. Miller*, Ind., 25 N. E. Rep. 143.

80. MUNICIPAL CORPORATIONS—Charters.—Since the act of 1883, although a general law is simply permissive, a city incorporated thereunder may reincorporate in the manner provided by the constitution, and, when the charter so framed is approved by the legislature, it supersedes the old charter, and the council elected under it becomes the true council of the city.—*People v. Bagley*, Cal., 24 Pac. Rep. 716.

81. MUNICIPAL CORPORATIONS — Charter.— Where, in calling the election of freeholders, 1,200 inhabitants, including 300 qualified voters, were omitted, and had no voice in the election; and no copy of the charter was delivered to the mayor, and none to the recorder; and it was not published in any daily paper for 20 days; and the election for ratification was called and held in less than thirty days after the completion of the publication,—there was such a violation of the mandatory provisions of the constitution as to invalidate the charter.—*People v. Gunn*, Cal., 24 Pac. Rep. 718.

82. MUNICIPAL CORPORATIONS—Markets.—A market within the meaning of that provision of the Jacksonville municipality act, authorizing the mayor and city council to establish and regulate markets, is a place to which the public may resort for selling and buying certain articles; and where the articles are exposed for sale in stalls or space provided for such purpose, and for the use of which stalls or space toll may be charged; and for whose government reasonable regulations, having in view the preservation of peace and good order and the health of the community, may be prescribed.—*City of Jacksonville v. Ledwith*, Fla., 7 South. Rep. 885.

83. MUNICIPAL CORPORATIONS—Ordinances.—A municipal ordinance making it unlawful for any street railway company to permit its road-bed or track to remain so high above the surface of the streets as to interfere with public travel, and declaring that "the president, superintendent, * * * or other officer of such company violating its provisions, is guilty of a misdemeanor, and subject on conviction to a fine, is unreasonable and void, so far as it undertakes to hold the superintendent of such a company responsible for the failure of his company to put its road in repair.—*Town of Oxanna v. Allen*, Ala., 8 South. Rep. 79.

84. MUNICIPAL CORPORATIONS—Quo Warranto.—The question as to whether or not a town is legally incorporated cannot be raised by bill for injunction, the remedy being by *quo warranto*.—*Bateman v. Florida Commercial Co.*, Fla., 8 South. Rep. 51.

85. MUNICIPAL ELECTIONS — Quo Warranto.—While, under the provisions of section 1679 of the Revised Statutes, the council of a municipal corporation is the exclusive judge of the election of its own members, *quo warranto* may be maintained against a person who assumes the exercise of the office of member of the council from a ward which has no legal existence, or under an election held without lawful authority.—*State v. O'Brien*, Ohio, 25 N. E. Rep. 121.

86. NEGLIGENCE—Proximate Cause.—Defendant's cars became uncoupled by the breaking of a defective link. In attempting to recouple them plaintiff sustained serious injuries: *Held*, that the defective link was the remote, and not the proximate cause of the injury.—*Pryor v. Louisville & N. R. Co.*, Ala., 8 South. Rep. 55.

87. PARTITION.—Under Pub. St. Mass. ch. 178, §§ 19-24, providing for the appointment of commissioners to make partition of lands, their proceedings, and the entry of judgment on their report, if it is confirmed, and section 74, authorizing the court to set aside their report for any sufficient reason, exceptions to the rulings of the commissioners can only be considered, on motion to affirm or reject the report, so far as such rulings may have led to the making of an unequal or unjust partition.—*Hall v. Hall*, Mass., 25 N. E. Rep. 84.

88. PLEDGES.—Where a person at the request of the consignee of cotton pays drafts drawn by the consignor on the consignee for advances on the cotton, knowing that the cotton was consigned for sale, and that the drafts were drawn for advances on the same, such persons will be *held* to know that the consignee had no authority to pledge the cotton for any loans beyond the amount of the advances.—*Goodwin v. Massachusetts L. & T. Co.*, Mass., 25 N. E. Rep. 100.

89. PRINCIPAL AND SURETY—Limitation of Actions.—Where a surety makes partial payments on the debt his right of action against his cosureties for contribution begins to run, as to each payment, from the time he pays the creditor more than his proportion of the debt.—*Bushnell v. Bushnell*, Wis., 46 N. W. Rep. 442.

90. PUBLIC LAND—Grants.—Title to the indemnity lands in the grant to the Northern Pacific Railroad Company does not pass from the United States until the selection of such lands by the company with the approval of the secretary of the interior. Until such approval such lands are not subject to taxation.—*Jackson v. La Moure County*, N. Dak., 46 N. W. Rep. 449.

91. RAILROAD COMPANIES—Liability.—Where a railroad is owned by one company, but controlled and operated exclusively by another, the former is in no way liable for any injury caused by the negligent management of a train by the employees of the latter company.—*Harper v. Newport News & M. V. R. Co.*, Ky., 14 S. W. Rep. 346.

92. RAILROAD COMPANIES — Stock-Killing.— Where a train is brought under control to avoid striking cattle which run down the railroad embankment, and, on the train being started up, one of them suddenly runs up the embankment and on the track, so near to the engine that a collision cannot be prevented, and is killed in trying to cross, the company is not liable.—*Alabama G. S. R. Co. v. Moody*, Ala., 8 South. Rep. 57.

93. REMOVAL OF CAUSES—Local Prejudice.—The right of a non-resident defendant to remove a suit from any State court to the Circuit Court of the United States

upon the ground that, from prejudice or local influence, he will not be able to obtain justice in such State court, etc., is confined to cases in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000.—*Bierbower v. Miller*, Neb., 46 N. W. Rep. 431.

94. REPLEVIN—Evidence.—In an action of replevin, based on an agreement of the husband for the sale or incumbering of personal property, the testimony showed that the wife was the owner of the property, and that the husband had no authority to sell or incumber the same: *Held*, that a verdict in favor of the wife for the value of the property was right, and would be sustained.—*Ashby v. Greenslade*, Neb., 46 N. W. Rep. 427.

95. RES ADJUDICATA.—Defendant conveyed land to N, who afterwards conveyed to P, and he mortgaged it to plaintiff. Defendant then sued and had the conveyances to N and P set aside, on the ground that they had colluded and obtained the conveyances from him by fraud: *Held*, that, in a suit by plaintiff to foreclose the mortgage, this judgment is not admissible to show fraud as against plaintiff.—*Hewlett v. Pilcher*, Cal., 24 Pac. Rep. 781.

96. RES ADJUDICATA.—In an action by a husband and wife to have a deed absolute on its face declared a mortgage, the complaint alleged that the deed passed neither dower nor homestead. The court merely held the deed a mortgage, and directed a sale to satisfy the debt, but ordered no allotment of homestead: *Held*, on petition for a homestead in said property, that it would be presumed that the court considered they had no right to a homestead.—*Moore v. Moore*, Ky., 14 S. W. Rep. 339.

97. SALE—Conversion.—Where a note is given in payment for a machine to which title is to remain in the seller until the note is paid, and is left with a third person, who is to receive chattels in payment, and surrender the note to the maker, and after this surrender is made the chattels are claimed under execution by the makers's creditors, the redelivery of the note by him to the third person, agreeing that it should be considered that no payment had been made, vests the title to the machine again in the seller, though the holder of the note had no other authority than to receive payment thereof, and surrender it.—*Bolling v. Kirby*, Ala., 7 South. Rep, 914.

98. SALE—Executory Contract.—Plaintiff and defendant entered into a written agreement for the sale and purchase of a stock of merchandise. No question was raised as to the sufficiency of the writing as a contract between the parties except in respect to the sale and purchase of "all soiled or damaged goods at valuation:" *Held*, that a binding and enforceable contract was made, and that all goods of the character above mentioned were sold and purchased at their value.—*Sergeant v. Dwyer*, Minn., 46 N. W. Rep. 444.

99. SALE—Warranty.—Where a counter-claim in an action for the price of a mill is based on a breach of an alleged warranty that the boilers in the mill were sound and in good condition, it is reversible error to instruct the jury that defendant must prove that the vendor warranted said machinery and boilers in said mill to be sound and in good condition and capable of performing the work of the mill to its fullest capacity, since such an instruction is broader than the pleading. *Rapp v. Kester*, Ind., 25 N. E. Rep. 141.

100. SHERIFFS AND CONSTABLES.—Under Code Ala. 1886, § 3105, where a sheriff fails to make indorsement an execution of the true date of delivery, a summary judgment can be had only for 10 per cent. of the amount of the execution, and any actual injury resulting from such omission must be separately sued for.—*Chandler v. Henry*, Ala., 8 South. Rep. 96.

101. SPECIFIC PERFORMANCE—Tender.—The lessee with contract of purchase having remained in possession and enjoyed all rents and profits after tendering the agreed purchase price, is liable for interest thereon from the date of tender, when he did not set it apart for the use of the vendors, but continued to use it himself.—*Sanders v. Breyer*, Mass., 25 N. E. Rep. 86.

102. TAX-DEED—Powers of Probate Judge.—Code Ala. 1886, §§ 581, 586, 592, invests the probate judge with authority to execute a tax-deed only "to the original purchaser" at the tax-sale, and "to the assignee, by written indorsement of the certificate of purchase:" *Held*, that a tax-deed to the administrators of the deceased purchaser at a tax-sale was void for want of authority in the probate judge to execute it, and inadmissible in evidence on behalf of the grantees as color of title.—*Alexander v. Salvage*, Ala., 8 South. Rep. 98.

103. TAXATION—Assessment.—Pub. St. Mass. ch. 11, § 18, provides that "the undivided real estate of a deceased person may be assessed to his heirs or devisees, without designating any of them by name, until they have given notice to the assessors of the division of the estate, and the names of the several heirs or devisees:" *Held* that, where it appears of record that the real estate of a decedent has become vested in devisees under a will duly probated and allowed, the taxes cannot be assessed to the heirs of the deceased under this section, and sales for non-payment of taxes so assessed are void.—*Tobin v. Gillespie*, Mass., 25 N. E. Rep. 88.

104. TAXATION—Assessments.—Under Sess. Laws Ala. 1886-87, p. 11, providing that in hearing objections to valuations fixed by the assessor for tax assessments evidence as to the market value of the property and its average annual yield shall only be received, the cost of its construction several years before cannot be considered.—*State v. Bienville Water-Supply Co.*, Ala., 8 South. Rep. 54.

105. TRESPASS ON HIGHWAY.—In trespass by the owner of the fee in a highway against a railway company in possession of land, which it had condemned, adjacent to the highway it appeared that defendant was constructing on the condemned land the approach to a bridge over a river, and the acts of trespass on the highway complained of were in connection with the building of the bridge, and would cease on its completion: *Held* that, as these acts did not offend against the fee, but merely the possession, plaintiff could not maintain the action.—*Fitch v. Boston P. & R. Co.*, Conn., 20 Atl. Rep. 345.

106. TRIAL—Reception of Evidence.—The statute prescribes the order of proof on the trial of a cause. This, however, may be varied by the court, where it will work no injustice to the parties. If a plaintiff fail to introduce all his evidence in chief in opening his case, and afterwards, when offering evidence to rebut the defendant's proof, introduces evidence in chief, the defendant has a right to offer proof to deny, modify or explain such new evidence.—*Gandy v. Early*, Neb., 46 N. W. Rep. 418.

107. TRIAL—Jurors.—With the means afforded by law for obtaining impartial jurors, public excitement alone is not a sufficient ground for continuance, especially where nearly two years have elapsed since the commission of the crime.—*Woolfolk v. State*, Ga., 11 S. E. Rep. 814.

108. TROVER AND CONVERSION—Damages.—To entitle a person to recover the highest market value between the time of the conversion of property and of the rendering of the verdict, he must affirmatively show such facts as establish clearly that he has commenced and prosecuted his action with reasonable diligence. No presumption will be indulged in his favor, and the statute will be strictly construed against him.—*Pickert v. Rugg*, N. Dak., 46 N. W. Rep. 446.

109. TRUSTEES—Investment of Trust-Fund.—A trustee invested between one-fourth and one-fifth of the amount of a trust-fund in the stock of a railroad company, paying a premium therefor. The road had been constructed, at great expense, through a new and comparatively unsettled country. It was heavily indebted, and its continued prosperity depended on circum-

stances so uncertain as to make the investment of trust-funds in its stock a considerable risk. He shortly afterwards invested in it a second amount nearly equal to the first, and paid a higher premium for the stock: *Held* that, while both investments were made in good faith, he was not justified in putting so large a proportion of the fund into such stock, and he should be charged with the amount of the second investment.—*Appeal of Dickinson*, Mass., 25 N. E. Rep. 99.

110. TRUSTS.—Land was conveyed to A. for the use and benefit of S and her children in trust that A, as her trustees, should permit S to enjoy the same free of rent for life, and then, after her death, A, or his successor, should have the right to permit the children of S "to use and occupy the premises so long as he thinks proper, and whenever in his judgment he thinks best, he may sell and convey the said lot, at public sale, on such terms as he chooses, and the proceeds of the sale 'divide equally among all the children of S' who may then be living." Contemporaneously with the execution of this conveyance, S conveyed certain other land to the grantor therein by deed reciting the conveyance to A for the use and benefit of S and her children: *Held*, that an active trust was created with an imperative power of sale, and that only those children who were living either at the death of S or at the time of a sale under the power were entitled to share in the proceeds.—*Connell v. Cole*, Ala., 8 South. Rep. 72.

111. TRUSTS—Construction.—One W conveyed personal property in trust for the payment of the income to his wife during her life, and after her death to his two children until one of them should attain a given age, and then the principal was to be divided between them. The deed further provided that, in case "both of my said children shall decease prior to their mother, their respective shares of said property shall be * * * delivered to * * * their respective heirs at law in same manner as if * * * they had deceased subsequently to my said wife:" *Held* that, where the children died before their mother, those persons take who would have taken personal property from the children had they died intestate immediately after the death of their mother.—*Codman v. Krell*, Mass., 25 N. E. Rep. 90.

112. USURY—Defense—Limitation.—Where money is loaned and a note taken for a larger sum, with an agreement that certain rents shall be applied in payment of principal and interest, and new notes are given, from time to time, after deducting the amounts paid by rent, less certain amounts for interest, the debtor is not barred by Gen. St. Ky. ch. 71, art. 3, § 4, limiting to a year the bringing of an action for recovery of usury theretofore paid, from setting up usury as a defense, when payment is finally demanded, and recovering for any payment in excess of the principal and legal interest.—*Rudd v. Anderson*, Ky., 14 S. W. Rep. 340.

113. VENDOR AND VENDEE—Abstract of Titles.—The contract between plaintiff and defendant for the purchase, by the former, of the latter's ranch, provided for payment in three installments, and further contained the following stipulations: "Title to be good, or the money to be refunded, party of the first part [defendant] to furnish abstract of title to said land." Defendant furnished the abstract shortly after plaintiff had made the first payment: *Held* that, where such abstract failed to show good title, plaintiff was entitled to recover the money already paid, even though defendant, as a matter of fact, had a good title.—*Boas v. Farrington*, Cal., 24 Pac. Rep. 787.

114. VENDOR AND VENDEE—Assuming Mortgage.—An agreement of a vendee of land, receiving title by a quit-claim deed, made with the grantor, as part of the consideration of the conveyance, to assume and pay the debt of the grantor, secured by mortgage on the land, may be enforced by the mortgagee, though such contract is not embodied in the deed; and such contract is not necessarily invalid because the same is not in writing.—*Indiana Yearly Meeting v. Haines*, Ohio, 25 N. E. Rep. 119.

115. VENDOR AND VENDEE—False Representations.—Where the vendor of a tract of land, sold for $40 per acre, represents the tract as containing 80 acres when he knows it to contain but 74.66, the vendee may, while retaining the land, recoup the overcharge from the deferred portion of the purchase money.—*English v. Arbuckle*, Ind., 25 N. E. Rep. 142.

116. WATER-CRAFT—"Owner."—One who simply holds the legal title to a water-craft as security for the amount due him upon the sale of it, having neither the possession nor control of the craft, is not an "owner" within the meaning of section 5880 and 5882, Rev. St., and is, therefore not liable for supplies furnished it.—*Hemm v. Williamson*, Ohio, 25 N. E. Rep. 1.

117. WILLS—Construction.—*Held*, that under the will the wife took a life-estate only in all her husband's property, and at her death the children took the property absolutely under their father's will, instead of under the will of the mother.—*Lewis v. Pitman*, Mo., 14 S. W. Rep. 52.

118. WILLS—Construction.—Testator bequeathed a certain fund in trust to pay the income, and, if necessary or expedient, the principal also, to his son for life, and at his son's death, to his issue absolutely, should he leave any; and further provided that if the son should die leaving no issue, whatever might remain of the trust fund should be distributed as follows: "To Mrs. Elizabeth C. Dutton one-twelfth part, and to her brother, the Rev. Mr. Lowell, one-twelfth part, and to Mr. Francis C. Lowell one twelfth part, and the children of his sister Susan one-twelfth part:" *Held*, that on the death of the testator the persons here named and designated took vested interests in the shares given them, subject to the contingencies that the fund might be entirely expended for the use of the son, or that he might die leaving issue; and, he having died without the happening of either contingency, the specified shares should be paid to them, or to their executors, if they were dead.—*Hills v. Barnard*, Mass., 25 N. E. Rep. 96.

119. WILLS—Contest.—Under Code Ala. 1886, §§ 2000, 2002, which limit to five years from its probate the time within which the validity of a will can be contested, a codicil which makes dispositions of testator's property essentially different from those in the will cannot be proved after the expiration of five years from the probate of the will, as its effect would necessarily be to disprove so much of the probate will, as it may revoke or modify.—*Watson v. Turner*, Ala., 8 South. Rep. 20.

120. WILLS—Republication.—A codicil ratifying and confirming a will, in whole or in part, will amount to a republication of the will, bringing down its words, and causing it to speak as of the date of the codicil.—*Hawke v. Euyart*, Neb., 46 N. W. Rep. 422.

121. WILLS—Trusts.—An active or express trus suspends the absolute power of alienation during its continuance, and such a trust is therefore void when it is to continue for longer than lives in being at the death of the testator. The absolute power of alienation in this State cannot be suspended for longer than the continuance of lives in being at the testator's death, except as provided in section 2745 of the Compiled Laws. The power to change the trust property from real to personal estate will not save the trust from the condemnation of the statute. The validity of a trust as to real estate is to be determined by the laws of its *situs*; as to personal property, by the laws of the domicile of the testator at the time of his death.—*Penfield v. Lower*, N. Dak., 46 N. W. Rep. 413.

122. WITNESS—Testimony at Former Trial.—A witness whose testimony, taken by interrogatories, is before the jury in a second trial, cannot be impeached by reading extracts from a brief of his evidence given in at a former trial, without first calling his attention to the brief, and affording him an opportunity to explain.—*Georgia R. & B. Co. v. Smith*, Ga., 11 S. E. Rep. 859.